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In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

NATIONAL TREASURY EMPLOYEES UNION AND
UNITED STATES NUCLEAR REGULATORY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether compensation of Federal employees whose rates of compensation are not specifically provided for by law is a negotiable "condition of employment" under 5 U.S.C. 7103(a)(14), which defines the terms in relevant part as "personnel policies, practices, and matters * * * affecting working conditions."

2. Whether a bargaining proposal concerning employee pay adjustments interferes with a Federal agency's management right to determine its budget under 5 U.S.C. 7106(a)(1) where the proposal does not prescribe a specific amount of money to fund an agency program, and the agency made no showing that the proposal's cost is not offset by compensating benefits.

3. Whether a bargaining proposal concerning rates of compensation for Nuclear Regulatory Commission employees is inconsistent with section 161(d) of the Atomic Energy Act when the agency, having fully exempted itself under section 161(d) from coverage of the Federal pay-setting laws, has full discretion over the establishment of compensation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	2
Reasons for granting the petition	14
I. The decision of the court below directly conflicts with those of other circuits which have considered the negotiability of pay and fringe benefits	14
II. The court below erroneously decided the three questions in this case	17
Conclusion	29
Appendix A	1a
Appendix B	23a
Appendix C	47a
Appendix D	48a
Appendix E	59a

TABLE OF AUTHORITIES

Cases:

American Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 F.L.R.A. 604 (1980), enf'd as to other matters, *sub nom. Dep't of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied *sub nom. AFGE* v. *FLRA*, 455 U.S. 945 (1982)	9, 11, 25
American Fed'n of Gov't Employees, Local 1897 and Dep't of the Air Force, Eglin Air Force Base, Florida, 24 F.L.R.A. 377 (1986)	9, 14
Beron v. *Kramer-Trenton Company*, 402 F. Supp. 1268 (E.D. Pa. 1975)	17
Bureau of Alcohol, Tobacco and Firearms v. *FLRA*, 464 U.S. 89 (1983)	3

Cases—Continued: Page

Charleston Naval Shipyard, Charleston, South Carolina v. *FLRA*, No. 88-2131 (4th Cir. Sept. 14, 1989) 17
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 27, 28, 29
Department of Defense v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982) 5
Department of Defense Dependents Schools v. *FLRA*, 863 F.2d 988 (D.C. Cir. 1988), reh'g *en banc* granted (Feb. 6, 1989) 15
Department of the Navy, Military Sealift Command v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988) 15
Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964) 22
Fort Knox Dependent Schools v. *FLRA*, 875 F.2d 1179 (6th Cir. 1989) 15
Fort Stewart Schools v. *FLRA*, 860 F.2d 396 (11th Cir. 1988), cert. granted, —— U.S.L.W. —— (U.S. Oct. 2, 1989) (No. 89-65) ..... *passim*
Hertz v. *Woodman*, 218 U.S. 205 (1910) 16
Inland Steel Co. v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied on this issue, 336 U.S. 960 (1949) 22
NFFE, Local 1167 v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982) 5
NLRB v. *ARA Services, Inc.*, 717 F.2d 57 (3d Cir. 1983) 16, 17
NLRB v. *J-Wood/A Tappan Division*, 720 F.2d 309 (3d Cir. 1983) 16
Overseas Education Ass'n, Inc. and Dep't of Defense, Office of Dependents Schools, 6 F.L.R.C. 231 (1978) 23
People v. *Jackson*, 212 N.W. 2d 918 (Mich. S. Ct. 1973) 17
Richfield Oil Corp. v. *NLRB*, 231 F.2d 717 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956) 22
United Fed'n of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 F.L.R.C. 211 (1972) 22

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West Point Elementary School Teachers Ass'n v. *FLRA*, 855 F.2d 936 (2d Cir. 1988) 13, 14, 24
Weyerhaeuser Timber Co., 87 N.L.R.B. 672 (1949) 22

Statutes, rules, and regulations:

The Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1988) 2
5 U.S.C. 7103(a)(12) 3, 5, 26
5 U.S.C. 7103(a)(14) ..... *passim*
5 U.S.C. 7103(a)(14)(C) 3, 19, 20, 21
5 U.S.C. 7105(a)(1) 3
5 U.S.C. 7105(a)(2) 3
5 U.S.C. 7105(a)(2)(E) 5, 27
5 U.S.C. 7105(a)(2)(I) 3
5 U.S.C. 7106 4
5 U.S.C. 7106(a)(1) ..... *passim*
5 U.S.C. 7106(b) 4
5 U.S.C. 7106(b)(2) 4
5 U.S.C. 7106(b)(3) 4
5 U.S.C. 7114(b)(2) 3
5 U.S.C. 7114(b)(5) 3
5 U.S.C. 7116(b)(7) 4
5 U.S.C. 7117(a) 19
5 U.S.C. 7117(a)(1) 4
5 U.S.C. 7117(c) 5, 8, 27
5 U.S.C. 7119(c)(5)(B) 4
5 U.S.C. 7119(c)(5)(C) 4
5 U.S.C. 7123(a) 3
5 U.S.C. 7123(b) 3
5 U.S.C. 7134 3
5 U.S.C. 7135 ..... 22, 23
28 U.S.C. 1254(1) 2
Atomic Energy Act of 1946, Pub. L. No. 79-585, sec. 2(a), 60 Stat. 724 (1946), as amended by the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954) 5, 6
§ 161(d), 42 U.S.C. 2201(d) ..... *passim*
Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111 (1978) 2
§ 704 21

Statutes, rules, and regulations—Continued: Page

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Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.) 2
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Executive Order Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.) 2
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 21
29 U.S.C. 158(d) 10, 12, 21
Prevailing Rate Systems Act of 1972, 5 U.S.C. 5341 *et seq.* 21
The Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.* 7
5 U.S.C. 5331 *et seq.* 6, 25
5 U.S.C. 5305 7
5 U.S.C. 5306 7
5 C.F.R. 2424.10 5
5 C.F.R. 2471.1 to 2471.12 4

Miscellaneous:

Annual Report of the Advisory Committee on Federal Pay (1982, 1983, 1984, 1985, 1986, 1987) 7
Office of Personnel Management, *Federal White-Collar Pay System, Report on a Market-Sensitive Study* (1989) 26
H.R. 9094, 95th Cong., 1st Sess. § 7103(a)(16) (1977), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print) 19
H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. (1978) 20
124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) 20

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NATIONAL TREASURY EMPLOYEES UNION AND
UNITED STATES NUCLEAR REGULATORY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.[1]

OPINIONS BELOW

The judgment of the court of appeals sitting *en banc* (App. 1a-22a) is reported at 879 F.2d 1225.

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[1] The National Treasury Employees Union (NTEU), a party intervenor on behalf of the Authority in the proceedings below, has previously petitioned the Court for a writ of certiorari to the lower court's judgment here at issue. *National Treasury Employees Union* v. *FLRA, et al.*, No. 89-198 (S. Ct., petit. for cert. filed Aug. 3, 1989). The Authority has moved the Court in No. 89-198 to postpone consideration of NTEU's certiorari petition until such time as the instant Authority certiorari petition and any responses thereto are filed with the Court.

The three judge panel decision of the court of appeals (App. 23a-46a) that was vacated by the full court is reported at 859 F.2d 302. The decision and order of the Federal Labor Relations Authority (App. 48a-58a) is reported at 29 F.L.R.A. 217.

JURISDICTION

The judgment of the court of appeals sitting *en banc* was entered on July 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1988), and the Atomic Energy Act, 42 U.S.C. 2201 (1982 & Supp. V 1987), are reproduced in the appendix (App. 59a-80a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the federal service.[2] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negoti-

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[2] The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

ability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1), (2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983). The Authority may also "take such other actions as are necessary and appropriate to effectively administer the provisions of [the Statute]." 5 U.S.C. 7105(a)(2)(I). The Authority is also empowered to engage in formal rulemaking pursuant to 5 U.S.C. 7134, and to "provide leadership in establishing policies and guidance" relating to federal sector labor relations matters, pursuant to 5 U.S.C. 7105(a)(1). *BATF* v. *FLRA*, *supra*, 464 U.S. at 93. The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of Authority orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

a. Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14). An exception to this statutory definition of the phrase "conditions of employment" is "matters * * * specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C). The Statute also expressly excludes certain matters from the general obligation to bargain. There is no duty

to bargain over the rights the Statute reserves to management as nonnegotiable. 5 U.S.C. 7106. One such management right is the right "to determine the * * * budget * * * of the agency." Further, there is no duty to bargain over proposed contract language which is inconsistent with a federal law, or with a government-wide rule or regulation. 5 U.S.C. 7117 (a)(1). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

Additionally, although strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7), Congress established a Federal Service Impasses Panel (FSIP or Panel). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. Either party may request the Panel to conduct an inquiry into a bargaining impasse. If, after the Panel makes initial recommendations to the parties they still cannot reach a settlement, the Panel may hold hearings and take whatever action is necessary and not inconsistent with this chapter to resolve the impasse. 5 U.S.C. 7119(c)(5)(B). See generally 5 C.F.R. 2471.1 to 2471.12 (1988). When the Panel imposes a term on the parties it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority.

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal was within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10 (1988). The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12). *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

b. The Nuclear Regulatory Commission ("NRC" or "Commission") was established as an independent regulatory agency by the Energy Reorganization Act of 1974, sec. 201, 42 U.S.C. 5841 (1982). The Commission licenses persons to build and operate nuclear reactors and use nuclear materials; and inspects the activities of licensees. The Commission received the licensing and related regulatory functions concerning the civilian uses of atomic energy previously assigned to the Atomic Energy Commission under the Atomic Energy Act of 1946, Pub. L. No. 79-585, sec. 2(a), 60 Stat. 724 (1946), as amended by the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954).

One of the amendments to the Atomic Energy Act of 1946 effected by the 1954 Act was the addition of Section 161(d) (App. 79a-80a), 42 U.S.C. 2201(d), concerning employment and compensation of personnel by NRC. Section 161(d) provides in relevant part that personnel may be employed and their compensation fixed by NRC without regard to the laws establishing the General Schedule pay system, which specifically provides pay rates for most Federal white-collar employees. *See, e.g.*, 5 U.S.C. 5331 *et seq.* The Commission exercised its discretion in this regard in 1975 by exempting all positions within the agency from coverage under Federal pay-setting laws, as had its predecessor, the Atomic Energy Commission (App. 32a-33a). However, NRC chooses to pay most of its employees the equivalent of the pay rates established by these pay-setting laws. Brief for NRC at 20 n.9, *NRC* v. *FLRA*, 859 F.2d 302 (4th Cir. 1988) (No. 87-3182).

2. During collective bargaining negotiations between the National Treasury Employees Union ("NTEU" or "union") and NRC, the union submitted the following proposal for collective bargaining:

> Section 52.1
>
> The salary structure, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the Pay Advisory Council. This adjustment will become effective at the beginning of the first pay period following the announcement of it by the Council or other

appropriate sources. It will be unaffected by Presidential or Congressional actions.[3]

Section 52.2

NTEU agrees to establish with the employer a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity

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[3] While the proposal refers to the "Pay Advisory Council," the union clarified before the Authority, as it had previously with the agency, that it meant the Advisory Committee on Federal Pay. The Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, assigned responsibility for setting pay to the President. Additionally, the Act provided that the President appoint a Pay Agent who prepares an annual report comparing salaries of federal employees with salaries of private sector employees and recommending appropriate adjustments in federal salaries necessary to reach parity with private sector salaries. The Act also created the independent, three-member Advisory Committee on Federal Pay (ACFP) which reviews the Pay Agent's report and makes additional recommendations to the President. The Pay Agent recommendation is generally an accurate reflection of the pay adjustment necessary to achieve comparability in pay between federal and private sector employees. *See* 5 U.S.C. 5305. The ACFP, on the other hand, is charged with providing the President with a recommendation on pay adjustments after considering the annual report of the President's Pay Agent, as well as other sources. 5 U.S.C. 5306. Thus, in 1982, the Pay Agent and the ACFP agreed on an 18.5% pay adjustment; in 1983 the Pay Agent and ACFP again agreed on a 21.5% increase; in 1984, the Pay Agent recommended 18.3% and the ACFP recommended 5.5%; in 1985, the Pay Agent recommended 19.15% while the ACFP recommended 4.7%; in 1986 the Pay Agent recommended 23.79% while the ACFP recommended 4%; and in 1987 the Pay Agent recommended 24% while the ACFP recommended 8%. *See Annual Report of the Advisory Committee on Federal Pay* (1982, 1983, 1984, 1985, 1986, 1987).

> of the employer, e.g., decrease employee turnover, remove work obstacles, improve upon available machines and procedures, and raise employee morale.

(App. 48a-49a). The Commission declared the proposal nonnegotiable and refused to bargain on it (App. 49a-50a). The union then sought review by the Authority of NRC's declaration of nonnegotiability under Section 7117(c) of the Statute, 5 U.S.C. 7117(c).

3. Before the Authority NRC argued that the proposal was nonnegotiable because it is inconsistent with Section 161(d) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(d); and because the proposal interferes with management's right to determine its budget under Section 7106(a)(1) of the Statute (App. 50a). The union responded before the Authority that Section 161(d) of the Atomic Energy Act gave NRC the discretion to negotiate pay; and that the proposal did not interfere with NRC's management right to determine its budget (App. 50a).

The Authority (Chairman Calhoun, dissenting) rejected NRC's arguments and found the proposal negotiable (App. 48a-57a). The Authority first held that the proposal was not inconsistent with Section 161(d) of the Atomic Energy Act (App. 51a-54a). The Authority observed (App. 52a) that NRC had pursuant to Section 161(d) previously exempted NRC employees from coverage of Federal pay-setting laws. Thus, the Authority ruled (App. 53a), the agency has unbridled discretion to negotiate on the union's pay proposal.

In holding that NRC has discretion to negotiate on pay matters under Section 161(d), the Authority

relied on its lead decision concerning the negotiability of employee pay, *American Fed'n of Gov't Employees, Local 1897 and Dep't of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. 377 (1986) (*Eglin*) (App. 53a). In *Eglin* the Authority held that pay matters are negotiable conditions of employment under the Statute, to the extent that the mater proposed is not specifically provided for by law and is within agency discretion; and the bargaining proposal is not otherwise inconsistent with law or appropriate regulation.

Finally, the Authority found (App. 54a-56a) that the proposal did not interfere with NRC's right to determine its budget under Section 7106(a)(1) of the Statute. Applying its long-established two prong test for determining when a bargaining proposal interferes with the budget right,[4] the Authority ruled that the proposal does not prescribe a particular agency program, or sum of money to be applied to a particular program; and that NRC had made no demonstration that implementation of the proposal would result in a significant, unavoidable increase in costs which is not outweighed by compensating benefits (App. 54a-56a). For the foregoing reasons the Authority found the union's proposal to be within the agency's duty to bargain, and ordered NRC to bargain on the proposal (App. 57a).

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[4] The Authority first set forth its two part test for implementing the budget right in *American Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604 (1980), enf'd as to other matters, *sub nom. Dep't of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied *sub nom. AFGE* v. *FLRA*, 455 U.S. 945 (1982) (*Wright-Patterson*).

4. A panel of the Fourth Circuit unanimously affirmed. The panel first agreed with the Authority that the bargaining proposal at issue was not inconsistent with Section 161(d) of the Atomic Energy Act (App. 31a-36a). The panel noted that after NRC removed itself from coverage under Federal pay-setting laws based on its determination under Section 161(d) that such removal was "necessary to the discharge of its responsibilities," Section 161(d) places no fetters whatsoever on NRC's discretion to establish employee pay rates. Thus, the panel held there is no basis for concluding Section 161(d) bars negotiation (App. 34a-36a).

The panel next rejected NRC's claim that pay matters are not negotiable "conditions of employment" as defined in Section 7103(a)(14) of the Statute (App. 36a-41a). The panel viewed the legislative history of the Statute, ambiguous though it is, as supporting the Authority's conclusion that Congress intended to bar negotiations on pay matters only to the extent that pay was specifically provided for in a Federal statute (App. 39a-41a). The panel also rejected NRC's claim that Congress' omission of a reference to wages in its definition of "conditions of employment" in the Statute, in contrast to the National Labor Relations Act (NLRA), 29 U.S.C. 158(d), supports the conclusion that wages are not an appropriate bargaining subject under the Statute (App. 40a n.7). The panel observed that the NLRA refers to "wages, hours and other terms and conditions of employment." Use of the connecting word "other" in this portion of the NLRA, the panel stated, suggests that Congress in the NLRA considered wages to be a condition of employment (App. 40a n.7).

Finally, the panel found the Authority's two-part *Wright-Patterson* budget test to be reasonable, and affirmed the Authority's holding that under that test the subject proposal did not interfere with the agency's budget right under Section 7106(a)(1) of the Statute (App. 41a-46a). The panel first held that the union's proposal merely sets a procedure for adjusting salaries, an item already existing in the NRC's budget and over which the NRC has control (App. 44a). Thus, the panel concluded, the proposal does not prescribe a particular program or amount of money to fund a program under the first prong of the *Wright-Patterson* test (App. 44a).

The panel next observed (App. 45a) that NRC's assertion of the budget right was premised solely on the claim that the proposal would result in a cost to the agency of less than 5% of its entire budget. Under NRC's view, the panel held, many bargaining proposals would be nonnegotiable purely because of their cost impact. This result would run counter to Congress' intent in the Statute to favor collective bargaining if there is doubt as to a proposal's negotiability, the panel noted (App. 45a). The panel also said that NRC's complete failure to make any showing under the second prong of the *Wright-Patterson* test, that the cost was not offset by compensating benefits, further justified the Authority's conclusion that the proposal did not interefere with NRC's budget right (App. 45a-46a).

5. A sharply divided court of appeals, sitting *en banc*, voted six to four to reverse the Authority (App. 1a-22a). The six judge majority first held that employee pay is not a "condition of employment" as defined in Section 7103(a)(14) of the Statute (App.

6a-14a). In this connection, the majority noted that compensation is not expressly referenced in the Statute as a bargainable subject (App. 7a). This was compared to the NLRA, 29 U.S.C. 158(d), which does expressly reference wages as a mandatorily bargainable matter (App. 8a-9a). The majority also referenced other laws, which make separate reference to compensation and employment conditions; and passages from the Statute's legislative history indicating a congressional intent to bar negotiations on pay (App. 9a-14a).

Five of the six judges voting to reverse the Authority next held that the union's proposal interfered with NRC's budget right under Section 7106(a)(1) of the Statute (App. 14a-18a).[5] This plurality stated that although the proposal did not specify a particular amount for employee pay, the proposal provided for a formula that would ultimately dictate an amount for pay (App. 16a-17a). Moreover, the plurality held that the proposal would divest NRC of budget making authority and transfer that function to the Advisory Committee on Federal Pay, thus affecting NRC's right to determine its budget under Section 7106(a)(1) of the Statute (App. 17a). The plurality also ruled that Congress in the Statute did not intend the Authority to assess a bargaining proposal's cost against its compensating benefits in determining whether a proposal interferes with man-

[5] Judge Hall, one of the six judges of the court voting for a judgment of reversal, indicated in a concurring opinion (App. 21a-22a) that he did not join in the parts of the majority opinion concerning the budget right and Section 161(d) issues. Judge Hall found the "conditions of employment" issue dispositive of the case (App. 21a-22a).

agement's budget right under Section 7106(a)(1) (App. 18a).

Finally, the court plurality held that the Authority erred in finding that the proposal was not inconsistent with Section 161(d) of the Atomic Energy Act (App. 18a-21a). The plurality said that Section 161(d) does not confer total discretion in NRC to set pay after that agency decided to exempt itself from Federal pay-setting laws (App. 19a). Rather, the plurality held (App. 19a), Section 161(d) requires NRC to make a separate determination, after exemption from the coverage of pay laws, that deviation from the pay rates set by the pay laws is "necessary to the discharge of its responsibilities." The plurality noted that NRC had never made this second determination, but continued to pay most of its employees consistent with the rates set in Federal pay laws (App. 19a-20a).

The four dissenting judges relied on the reasons set forth in the superseded panel decision to support their view that the Authority's decision should be affirmed and enforced (App. 22a). The dissenters also relied on the decisions of the Second and Eleventh Circuits in *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936 (2d Cir. 1988); and *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (11th Cir. 1988), cert. granted, —— U.S.L.W. —— (U.S. Oct. 2, 1989) (No. 89-65) (*Fort Stewart Schools*) (App. 22a). These Second and Eleventh Circuit decisions accord with the panel decision of the court below.

REASONS FOR GRANTING THE PETITION

Review is warranted because the court below incorrectly decided issues of great importance to Federal employees and the Federal government. Moreover, there is a direct conflict in the courts of appeals on the issue of the negotiability of pay and money related fringe benefits for the few groups of federal employees whose compensation is not specifically provided for in Federal law.

I. The decision of the court below directly conflicts with those of other circuits which have considered the negotiability of pay and fringe benefits

There is a direct conflict in the courts of appeals on the question of whether compensation is a "condition[] of employment" under the Statute subject to collective bargaining in an agency whose pay rates are not fixed by law. The Second Circuit [6] and the Eleventh Circuit [7] have found that pay is a negotiable "condition of employment" under Section 7103(a)(14) of the Statute for certain employees, in the absence of a law that specifically provided for those employees' pay.[8] The court below, in a sharply

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[6] *West Point Elementary School Teachers Ass'n* v. *FLRA*, *supra*, 855 F.2d at 939-940.

[7] *Fort Stewart Schools*, *supra*, 860 F.2d at 399-402.

[8] The pay and fringe benefits of most Federal employees are explicitly established by law. Therefore, the Authority has noted, pay is not negotiable for the overwhelming majority of Federal employees. *Eglin*, *supra*, 24 F.L.R.A. at 378. It is only a few specific groups of federal employees, e.g., the employees of the Nuclear Regulatory Commission, whose pay is not specifically provided for by law, and who can therefore negotiate pay matters under the Authority's ruling.

divided *en banc* decision, joined the Third,[9] Sixth[10] and D.C.[11] Circuits in finding that compensation is not a negotiable "condition of employment."

Moreover, this conflict among the courts of appeals is express. The court below noted (App. 6a n.1) that the Third, Sixth, and District of Columbia Circuits had also concluded that pay for Federal employees was nonnegotiable and cited the contrary decisions of the Eleventh and Second Circuits. Likewise, the Eleventh Circuit acknowledged the Third Circuit's contrary decision but agreed with the Second Circuit's decision. *Fort Stewart Schools*, *supra*, 860 F.2d at 401. In finding pay to be a nonnegotiable condition of employment, the Sixth Circuit cited the decisions finding pay matters negotiable as well as those finding the matters nonnegotiable. *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181-1183 (6th Cir. 1989). The D.C. Circuit noted, in finding pay matters are not negotiable "conditions of employment," that it was fully aware of contrary decisions on this issue by the Second and Eleventh Circuits. *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 991 n.3 (D.C. Cir. 1988) reh'g *en banc* granted (Feb. 6, 1989). While each of these cases involves a variety of different groups of Federal employees, including the Nuclear Regulatory Commission employees in the instant case,

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[9] *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988).

[10] *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179 (6th Cir. 1989).

[11] *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 991 n.3 (D.C. Cir. 1988), reh'g *en banc* granted (Feb. 6, 1989).

overseas dependents schools teachers, Department of Defense Dependents Schools (DODDS) domestic teachers and civilian mariners, the courts all dealt with the overriding issue of the negotiability of pay matters as a "condition of employment".

This split in the circuits is on an issue of considerable importance. Clearly the negotiability of pay involves a matter of great significance to the employees involved. The split in circuit law on this issue means that employees whose pay is not set by statute will have different rights to bargain through their exclusive representatives on pay matters than will similarly situated employees in other parts of the country. Moreover, and equally important, the resolution of the question of what constitutes a "condition of employment" under the Statute is of great importance in determining the scope of public sector bargaining under the Statute.[12] Review by this Court

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[12] It is unclear whether, as a result of the instant case, there is a direct conflict among the circuits on the question of whether compensation-related proposals conflict with management's right to determine its budget under Section 7106 (a) (1). The absence of a majority of the participating judges joining in the resoluiton of the budget issue in the *en banc* court below means that the court of appeals' *en banc* ruling on the budget right issue is not the law of the circuit. See, e.g., *Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910) ("but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts") ; *NLRB* v. *J-Wood/A Tappan Division*, 720 F.2d 309, 319 n.1 (3d Cir. 1983) (Gibbons, J., noting the absence of an opinion of the ten-member court on an issue where the vote was 5-4, with one judge concurring in the result but not the reasoning of the five-judge opinion in *NLRB* v. *ARA Services, Inc.*, 717 F.2d

is plainly warranted.[13]

II. The court below erroneously decided the three questions in this case

A. The court below misconstrued the statutory scheme and the Statute's legislative history, thereby erroneously concluding that the statutory term "conditions of employment" does not include compensa-

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57 (3d Cir. 1983) (*en banc*)); *Beron* v. *Kramer-Trenton Company*, 402 F. Supp. 1268, 1277 (E.D. Pa. 1975) ("only those holdings which muster majority approval may be accorded precedential value"); *People* v. *Jackson*, 212 N.W. 2d 918, 921 (Mich. S. Ct. 1973) (in a decision with 7 judges participating, "[s]ince neither opinion obtained four signatures, neither is binding under the doctrine of *stare decisis*" (emphasis in original)). However, a three judge panel of the court below in another case recently adopted the plurality ruling of the *en banc* court on the budget right issue in the instant case. *Charleston Naval Shipyard, Charleston, South Carolina* v. *FLRA*, No. 88-2131 (4th Cir. Sept. 14, 1989) (slip op. at 5-7). As indicated at p. 24, *infra*, the Second and Eleventh Circuits have adopted the Authority's budget test as applied in pay negotiability cases.

[13] This Court's granting of a certiorari petition in *Fort Stewart Schools* v. *FLRA, et al.*, No. 89-65 (S. Ct., cert. granted, Oct. 2, 1989) which also involves the "conditions of employment" and budget right issues presented in the instant case, is not a reason to defer consideration of the instant petition. The instant case involves a third issue, concerning Section 161(d) of the Atomic Energy Act (see pp. 27 to 29, *infra*) which is not present in *Fort Stewart Schools*. Thus, disposition of *Fort Stewart Schools* will not fully dispose of the instant case. Accordingly, the Authority respectfully submits that its certiorari petition, along with that of NTEU in No. 89-198, be simultaneously considered in due course. In the event the certiorari petitions in the instant case and No. 89-198 are granted, consolidation of these cases with *Fort Stewart Schools* for oral argument before the Court may then be appropriate.

tion (App. 6a-14a). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * * ." 5 U.S.C. 7103(a)(14). As the Eleventh Circuit stated in *Fort Stewart Schools*, *supra*, 860 F.2d at 400, this definition alone does not exclude compensation and fringe benefits. Indeed, an employee's compensation is an integral part of the conditions on which the employment relationship is based.

1. The court below based its determination that pay was not a negotiable condition of employment on the erroneous presumption that Congress had to affirmatively denominate specific subjects of collective bargaining. The court of appeals stated (App. 7a) that there was no "evidence" in the statutory text that Congress intended bargaining over compensation when it is not set by statute. Such a reading of the statutory language displays a fundamental error in determining how Congress established the scope of collective bargaining under the Statute. Contrary to the court's view, the Statute does not specifically list all conditions of employment subject to the bargaining obligation. Rather, the Statute establishes the broad, generic definition for conditions of employment, referenced above, which on its face clearly encompasses employee compensation matters. Indeed, many indisputably negotiable matters, such as employee health and safety measures, are not expressly referenced in the Statute as "conditions of employment" either. Thus, the Statute's omission of an express reference to compensation as a "condition[] of employment" should have been of no significance to the court of appeals. What is truly sig-

nificant is that the Statute nowhere expressly *prohibits* pay bargaining per se.[14]

The legislative history of the Statute further supports the Authority's position over that of the lower court. The court below incorrectly analyzed (App. 10a) congressional rejection of enumeration of specific bargaining subjects as a narrowing of the scope of conditions of employment. In fact, the definition of "conditions of employment" set out in Federal sector labor bills preceding the Statute is the same as the broad definition included in the Statute, except for omission of the listing of specific items included within that definition. Compare H.R. 9094, 95th Cong., 1st Sess. § 7103(a)(16)(1977), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 244 (Comm. Print No. 96-7) (*Legis. Hist.*) and 5 U.S.C. 7103(a)(14). As the Eleventh and Second Circuits and the panel below recognized, Congress' omission of express references to specific bargainable matters in no way indicates congressional intent to

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[14] Of course, for those employees whose pay is "specifically provided for" by law, the matter is outside the definition of "conditions of employment" under Section 7103(a)(14)(C) of the Statute. Moreover, any pay proposal that is inconsistent with law, rule, or appropriate regulation is also nonnegotiable under Section 7117(a) of the Statute. Thus, contrary to the approach of the court below, the scope of bargainable matters that would otherwise fit within the broad definition of conditions of employment is narrowed through other provisions of the Statute which focus on whether the matter is specifically provided for by law or inconsistent with law, rule or regulation or a relevant management right.

make proposals dealing with those matters nonnegotiable.

The court below erroneously relied (App. 11a-13a) on comments in the Statute's legislative history, to the effect that Federal pay which is set by statute is nonnegotiable, for its conclusion that Congress intended pay matters per se to be outside the Statute's definition of conditions of employment.[15] Congress in the text of the statute itself ultimately made pay matters nonnegotiable for most Federal employees, not by excluding pay as a condition of employment, but rather by making matters that are "specifically provided for by Federal statute" outside the scope of bargainable subjects. 5 U.S.C. 7103(a)(14)(C). The Eleventh Circuit correctly recognized that the legislative comments regarding the negotiability of pay "indicate that the legislators merely were assuring their peers that the [Statute] would not supplant specific laws which set wages and benefits." *Fort Stewart Schools*, *supra*, 860 F.2d at 402. Thus, in contrast to the Authority, the court of appeals' view

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[15] For example, the House Report on the bill reported out of committee stated that "Federal pay will continue [under the bill] to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 12 (1978), *Legis. Hist.* at 682. This Report also stated, concerning negotiation on overtime pay, that "rates of overtime pay are not bargainable, because they are specifically provided for by statute." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 44 (1978), *Legis. Hist.* at 690. *See also*, 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (Cong. Ford), *Legis. Hist.* at 855-56 ("no matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement").

of the Statute's legislative history finds no manifestation in the Statute's language. Its erroneous construction of that legislative history further undermines its holding.

2. The court below also erred in finding that labor laws other than the Statute warrant a conclusion that employee compensation is not a condition of employment under the Statute's definition of that phrase. For example, Section 704 of the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. at 1218 (1978), *reprinted in* 5 U.S.C. 5343 note (1988), relied on by the court of appeals (App. 9a-10a), expressly authorizes pay bargaining for certain groups of Federal blue-collar employees who historically bargained such matters. However, this provision does not support the view that pay must be expressly referenced in Section 7103(a)(14) of the Statute to be negotiable. The employees covered under Section 704 would, in the absence of that Section, have their pay rates "specifically provided for" by the Prevailing Rate Systems Act of 1972, 5 U.S.C. 5341 *et seq.* Thus, Section 704 is required to save these employees from having their pay rendered nonnegotiable by operation of Section 7103(a)(14)(C) of the Statute. The NRC employees in this case are not in that situation.

The court below also erred in relying on the language of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* The NLRA permits bargaining over "wages, hours, and *other* terms and conditions of employment." 29 U.S.C. 158(d) (emphasis added). As the Eleventh Circuit (860 F.2d at 400) and the panel below (App. 40a n.7) correctly concluded, the use of the connecting word "other" indicates that Congress in the NLRA intended wages and hours to be conditions of employment. As the Eleventh Cir-

cuit stated, Congress likely specified "wages" and "hours" in the NLRA to illustrate the meaning of the then-new term "conditions of employment." *Fort Stewart Schools, supra*, 860 F.2d at 400.

The lower court's reliance on Justice Stewart's concurrence in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964), for the proposition that "conditions of employment" under the NLRA is the "various physical dimensions of [an employee's] working environment" is clearly inapposite. As discussed at pp. 18 to 19, *supra*, the Statute expressly includes personnel policies, practices, and matters affecting working conditions as "conditions of employment," and does not limit the term to the mere physical work environment. Indeed, even under the NLRA conditions of employment have been held to encompass matters involving employee compensation. *See Richfield Oil Corp.* v. *NLRB*, 231 F.2d 717, 724 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956) (stock purchase plans); *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), cert. denied on this issue, 336 U.S. 960 (1949) (pension and retirement plans); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949) (price of meals at company facility).

3. Finally, the court below also failed to give full consideration to Section 7135 of the Statute, 5 U.S.C. 7135. This Section provides that all prior rulings established under previous Executive Orders remain in full force and effect unless superseded by Congress or subsequent Authority decisions. The Statute continued the principle established under Executive Order 11491, as amended, that matters affecting working conditions are negotiable to the extent they are not specifically provided for by statute, or are inconsistent with applicable law, Government-wide rule

or agency regulation for which a compelling need exists. The Authority's predecessor, the Federal Labor Relations Council (FLRC), which prior to enactment of the Statute administered Executive Order 11491, as amended, found that Federal employees whose wages and fringe benefits were not established by law could bargain over those wages and benefits. *See Overseas Education Ass'n, Inc. and Dep't of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231, 232-34 (1978) (proposals prescribing procedures and formulas to be used in determining teacher compensation were within the bargaining obligation); *United Fed'n of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 212 (1972) (proposals concerning compensation for college faculty were negotiable). The court below failed to address the existence of these cases and their continued validity under Section 7135, and Congress' presumed awareness from these cases that such matters were negotiable under the prior Executive Order scheme.

B. The court of appeals also erred in rejecting the Authority's holding that the union's proposal does not interfere with the agency's right to determine its budget under Section 7106(a)(1) of the Statute. The Authority's long-established two part test for determining whether a bargaining proposal interferes with management's budget right is whether the proposal prescribes agency programs or specific amounts of money to fund programs; or whether agency management has shown that the proposal causes a substantial increase in costs that are not offset by compensating benefits (App. 54a-56a). Thus, the Authority's budget test guards against both direct union efforts to participate in the agency's

budget formulation process, and indirect efforts to do so through proposals whose net or real costs are so high as to compel agency budget decisions. The Second and Eleventh Circuits have endorsed the Authority's budget test and its application in pay negotiability cases. *West Point Elementary School Teachers Ass'n, supra*, 855 F.2d at 943-944; *Fort Stewart Schools, supra*, 860 F.2d at 405-406.

The court of appeals erroneously concluded (App. 16a-17a) that by establishing a formula which could eventually be translated into a specific dollar amount for employee pay increases, the proposal effectively prescribes a specific dollar amount for an agency program under the first prong of the Authority's test.[16] The court below also erred in holding that the union's pay proposal is nonnegotiable because it divests NRC of its budget making authority; and that the Authority improperly decides whether a proposal's benefits sufficiently offset its costs so as not to interfere with an agency's budget right (App. 17a-18a).

First, as the Fourth Circuit panel and the *en banc* dissenters noted (App. 22a, 43a-44a), a bargaining proposal that establishes a procedure for setting employee pay, which procedure may translate into a specific dollar amount for a pay increase, is not the same as a proposal that prescribes a dollar amount to be applied by an agency to a particular program. Many

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[16] In so holding, the court of appeals adopted over the Authority's objections an argument advanced by NRC for the first time in *en banc* proceedings before the court of appeals. Prior to that time NRC had not argued to the Authority or the court below that the proposal was infirm as prescribing a specific dollar amount to fund a particular agency program. Indeed, NRC had previously conceded to a panel of the court that the proposal did not run afoul of the first prong of the Authority's budget test (App. 44a).

proposals, like thhe instant one, can be converted into a specific cost figure.[17] However, the nature of formulating a budget is establishing specific dollar amounts to be applied to particular programs. *Wright-Patterson, supra,* 2 F.L.R.A. at 607-08. Proposals which simply have cost ramifications cannot be said to inject a union directly into the budget formulation process protected from bargaining under the first prong of the Authority's budget test. If this were the case, as the court of appeals panel and *en banc* dissenters noted (App. 22a, 45a), the scope of bargaining under the Statute would be unduly restricted because numerous proposals with initial cost consequences would be nonnegotiable as violative of the budget right.[18]

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[17] For example, a proposal that employees be provided with safety shoes could be converted into a specific dollar amount by multiplying the number of employees times the cost of a pair of safety shoes. Under the court of appeals' holding, because that proposal would "ultimately * * * dictate a specific dollar amount to be allocated" in an agency program (App. 17a), the proposal would be nonnegotiable.

[18] The Authority has recognized, in the second prong of its budget test, that proposals which result in a substantial net or real cost can indirectly compel agency budget decisions in violation of the budget right. *Wright-Patterson, supra,* 2 F.L.R.A. at 608. In the instant case the agency made no effort before the Authority or the court below to show that compensating benefits of a pay increase do not reduce the real cost of the proposal. Yet the Office of Personnel Management (OPM) has itself recognized the relationship between employee pay and turnover. OPM has recently stated that the inflexibility of the General Schedule (which sets pay for most white-collar Federal employees under 5 U.S.C. 5331, et seq.) and the lower pay rates for many Federal job occupations compared to private sector rates, have resulted in "significant recruitment and retention problems in some oc-

Second, contrary to the reasoning of the court below (App. 16a-18a), a bargaining proposal is not properly held to interfere with a management right simply because it devises a method or procedure for setting a condition of employment which involves a third party. Indeed, the collective bargaining process established in the Statute contemplates that negotiations may result in establishing employment conditions different from what an employer agency may have established in the absence of a bargaining obligation. 5 U.S.C. 7103(a)(12) ("collective bargaining" defined in relevant part as the mutual obligation of employer agency and union to "bargain in a good faith effort to reach agreement with respect to the conditions of employment" of bargaining unit employees and commit that agreement to writing).

Thus, in the instant case the union's proposal is no more appropriately held nonnegotiable because the ACFP-recommended pay increase would set employee pay than if the proposal referenced only the percentage recommended by ACFP, without explicitly referencing ACFP at all. In either case the proposal would presumably compel the agency to take action concerning employee pay it otherwise may not have chosen to take in the absence of the bargaining obligation. This fact alone, however, is insufficient to support a holding of nonnegotiability, contrary to the court of appeals' conclusion.

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cupations and some geographic areas." Office of Personnel Management, *Federal White-Collar Pay System, Report on a Market-Sensitive Study*, at 4-5, 15 (1989). Thus, NRC's failure even to address the net cost of the proposal here at issue, after cost savings from reduced turnover, reduced new employee training costs, etc., are factored in, warrants the Authority's rejection of NRC's budget right assertions under the second prong of the Authority's budget test.

Third, the court below erroneously ruled (App. 17a-18a) that it is not for the Authority to assess whether a proposal's compensating benefits sufficiently offset its costs under the second prong of the Authority's budget test. Congress gave the Authority the power to review and rule on agency assertions that a management right bars bargaining on a particular proposal. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the court of appeals' view, the Authority would simply "rubber stamp" agency employer conclusions about what the employer should negotiate. This view is clearly untenable.

Moreover, the second prong of the Authority's budget test concerning offsetting benefits in no way mandates how an agency should maximize competing goals of an agency's operations, as the court below mistakenly ruled (App. 18a). The agency remains free to engage in this analysis. The Authority's budget test, in its second prong, explicitly provides a means for management to protect against concerns such as balancing the need to attract new employees against other priorities. However, the agency must support its conclusions concerning increased costs by demonstrating that the significant, unavoidable cost of the proposal does not have the requisite compensating benefits. The test seeks to preserve management's right to make such determinations without unduly constricting the scope of bargaining. The agency here failed to provide any evidence other than a generalized statement of increased cost, and its claim was therefore properly rejected by the Authority and the court of appeals panel.

C. The court below also incorrectly ruled (App. 18a-21a) that the union's proposal was inconsistent with Section 161(d) of the Atomic Energy Act. In *Chevron, U.S.A., Inc.* v. *Natural Resources Defense*

Council, Inc., 467 U.S. 837, 842-43 (1984), this Court held that if congressional intent is clear from the face of a statute, the agency administering the statute as well as the courts must effectuate that intent. As the court of appeals panel and *en banc* dissenters correctly stated (App. 22a, 34a), Section 161(d) plainly places no limits whatsoever on NRC's discretion to set pay rates after that agency has decided it is necessary to exempt itself from coverage of Federal pay-setting laws, as NRC did in 1975. The lower court plurality therefore erroneously adopted NRC's contrary view of Section 161(d), that a subsequent NRC determination to vary from the pay rates set by Federal pay-setting laws, after removal from coverage under those laws, must also be supported by an NRC determination of necessity.

By its relevant terms, Section 161(d) requires NRC to pay its employees in accordance with the pay-setting General Schedule system covering most Federal employees, "except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws." This language clearly addresses a single event, i.e., exemption of NRC from the coverage of pay-setting laws, which is governed by a statutory standard of necessity. This event occurred in 1975, when pursuant to Section 161(d) NRC advised the Civil Service Commission that in NRC's view it was necessary for NRC to remove itself from coverage of those pay-setting laws. Thus, NRC's decision that is tethered to the statutory standard of necessity was fully consummated in 1975. Any further NRC decisions concerning employee pay, such as agreement to the union's proposal in this case, are simply unaddressed by Section 161(d).

NRC's claim, accepted by the lower court plurality, that the standard of necessity in Section 161(d) also extends after exemption to NRC decisions to vary from pay rates established under Federal pay-setting laws, is "manifestly contrary" to the plain language of Section 161(d) and should have been rejected by the court below. *Chevron*, 467 U.S. at 843-45. Section 161(d) focuses exclusively on NRC's exemption from pay-setting laws themselves, not the rates set in those laws. Accordingly, as the panel and *en banc* dissenters correctly held (App. 22a, 34a), NRC's decision after exemption as to whether to continue pay rates established in pay-setting laws is purely one of NRC's unbridled discretion. Section 161(d) therefore interposes no obstacle to NRC's bargaining on the proposal here at issue, contrary to the lower court's holding.

CONCLUSION

The petition for a writ of certiorari should be granted.[19]

Respectfully submitted.

WILLIAM E. PERSINA *
Acting Solicitor

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OCTOBER 1989

* Counsel of Record

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[19] The Acting Solicitor General authorizes the filing of this petition.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-3182

NUCLEAR REGULATORY COMMISSION, PETITIONER

versus

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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Argued: April 10, 1989 Decided: July 14, 1989

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges, sitting en banc.*

Robert Kenneth Rasmussen (William H. Briggs, Jr., Solicitor; E. Leo Slaggie, Deputy Solicitor, Mary K.

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* Judge Winter did not participate in the decision in this case.

Hembree, Office of the General Counsel, U.S. NUCLEAR REGULATORY COMMISSION; Dennis C. Dambly, Deputy Assistant General Counsel for Administration; Marvin L. Itzkowitz, Senior Counsel for Labor and Personnel on brief) for Petitioner. William Eugene Persina, Deputy Solicitor (Ruth E. Peters, Solicitor; Jill A. Griffin, FEDERAL LABOR RELATIONS AUTHORITY on brief) for Respondent. Gregory O'Duden, Deputy Director of Litigation (Lois G. Williams, Director of Litigation, NATIONAL TREASURY EMPLOYEES UNION on brief) for Intervenor.

WILKINSON, Circuit Judge:

The Nuclear Regulatory Commission (NRC) petitions for review of an order of the Federal Labor Relations Authority (FLRA) directing the NRC to bargain in good faith over a salary proposal advanced during collective bargaining by the National Treasury Employees Union. *See National Treasury Employees Union & Nuclear Regulatory Comm'n*, 29 FLRA (No. 19) 217 (September 29, 1987). The FLRA cross-petitioned for enforcement of its order and this court granted the union's motion for leave to intervene in these proceedings. We hold that the NRC is not obligated to bargain over the union's salary proposal and therefore grant the NRC's petition for review. The FLRA's decision is reversed and enforcement of its bargaining order is denied.

I.

A.

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-35, recognizes the right of federal

employees to belong to unions and establishes a collective bargaining system for the federal sector. Although Title VII provides for employee and union participation in the public sector, it is not simply an "employees' rights statute." *United States Department of Health & Human Services v. FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988). Rather, Congress expressly recognized in Title VII "the special requirements and needs of the Government," and sought to balance these interests against the rights of employees to participate in labor organizations. *See* 5 U.S.C. § 7101(b). Public sector labor relations differ therefore in important respects from those of the private sector. *See* 124 Cong. Rec. S14,281 (daily ed. Aug. 24, 1978) (remarks of Sen. Sasser), *reprinted in Subcommittee on Postal Personnel and Modernization of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 1014 (1979) [hereinafter *Legislative History*]. While salaries and benefits are often the central subject of private-sector collective bargaining, most wages in the public sector are set by statute. Also, unlike private-sector bargaining, many matters in the public sector are not negotiable because agencies and unions are not free to contravene standards which have been enacted into law.

In general, Title VII obligates federal employers and employee unions to engage in collective bargaining over "conditions of employment." *See* 5 U.S.C. §§ 7114(a)(4), 7103(a)(12) & 7103(a)(14). The duty to bargain does not extend, however, to contract proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation," 5

U.S.C. § 7117(a)(1), or which interfere with certain prerogatives reserved by statute to agency management. *See* 5 U.S.C. § 7106. Federal agencies and employee organizations must make good faith efforts to reach agreement on conditions of employment not excluded from the bargaining process. *See* 5 U.S.C. § 7114(a)(4). But, again unlike private-sector bargaining, the public sector provides a mechanism that can compel the adoption of a negotiable proposal. If the parties fail to agree on a negotiable contract proposal, Title VII provides for third-party resolution of the dispute. *See* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C). Title VII's duty to bargain over a contract proposal subjects the agency to the possibility that the Federal Service Impasses Panel will resolve the dispute by imposing a binding proposal upon the agency. *See* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C).

B.

The Nuclear Regulatory Commission administers the Atomic Energy Act of 1954, *see* 42 U.S.C. §§ 2011 *et seq.*, and is charged with overseeing the development, utilization, and control of nuclear technology so as to promote the general welfare and security of the United States. *See* 42 U.S.C. §§ 2011-13 & 2201. The National Treasury Employees Union is the exclusive representative of a bargaining unit comprising all professional, nonprofessional, and wage-earning employees of the NRC, with the exception of managers, supervisors, or "confidential employees" as defined in 5 U.S.C. § 7103(a)(13).

In October of 1984, during the course of collective bargaining, the union submitted a proposal to the

NRC which included a periodic cost-of-living adjustment. The proposal provided in pertinent part that:

> [t]he salary structure, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the [Advisory Committee on Federal Pay, *see* 5 U.S.C. § 5306]. This adjustment will become effective at the announcement of it by the [Committee] or other appropriate sources. It will be unaffected by Presidential or Congressional actions.

The NRC refused to bargain, finding the contract proposal nonnegotiable. The agency objected, *inter alia*, to the fact that the Advisory Committee's recommendations would be "unaffected by Presidential or Congressional actions," noting that the Committee frequently recommends increases well above those passed by Congress and signed by the President. The agency determined that the union's proposal would violate Title VII's "management rights clause" by affecting management decisions to determine the agency's budget. *See* 5 U.S.C. § 7106(a)(1). The NRC also believed the salary proposal to be inconsistent with the statutory requirements of the Atomic Energy Act, *see* 42 U.S.C. § 2201(d), and therefore nonnegotiable pursuant to § 7117 of Title VII.

On March 20, 1986, the union petitioned the FLRA for review of the NRC's nonnegotiability determination. The FLRA ordered the NRC to negotiate with the union, finding the salary proposal within the agency's duty to bargain. *National Treasury Em-*

ployees Union & Nuclear Regulatory Comm'n, 29 FLRA (No. 19) 217 (September 29, 1987). According to the FLRA, the union's proposal was a negotiable "condition of employment," 5 U.S.C. § 7103(a)(14), did not violate the NRC's right to determine its budget under 5 U.S.C. § 7106, and was not "inconsistent" with any provision of the Atomic Energy Act, 42 U.S.C. § 2201(d). *See* 5 U.S.C. 7117(a)(1). The NRC petitioned for review of the FLRA's decision. A panel of this court enforced the FLRA's bargaining order. *Nuclear Regulatory Comm'n v. FLRA*, 859 F.2d 302 (4th Cir. 1988). Review by the en banc court followed.

II.

Title VII of the Civil Reform Act grants federal employees the right to negotiate over "conditions of employment." 5 U.S.C. § 7102(2). *See also* 5 U.S.C. §§ 7101(a)(1)(C) & 7114(a)(4). The NRC asserts that the statutory term "conditions of employment" does not include compensation. We agree. Title VII does not authorize labor organizations and federal agencies to negotiate over employee pay.[1]

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[1] The Third, Sixth, and District of Columbia Circuits also have concluded that Congress did not intend to subject the pay of federal employees to collective bargaining under Title VII of the Civil Service Reform Act. *See Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (3d Cir. 1988); *Fort Knox Dependent Schools v. FLRA*, —— F.2d ——, No. 87-3395 (6th Cir. May 11, 1989); *Department of the Treasury, Bureau of Engraving & Printing v. FLRA*, 838 F.2d 1341 (D.C. Cir. 1988). *See also Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988 (D.C. Cir. 1988) (vacated for rehearing en banc). *But see Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988); *West Point Elementary School Teachers Ass'n v. FLRA*, 855 F.2d 936 (2d Cir. 1988).

"Conditions of employment" are defined in Title VII as those:

> personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute. . . .

5 U.S.C. § 7103(a)(14). As with any case of statutory interpretation, "our analysis must begin with the language of the statute itself." *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). A plain reading of the text indicates that Congress did not include employee pay within the statutory definition of bargainable matters. There is no evidence in the statutory text that Congress intended for federal agencies and employee unions to negotiate over employee compensation where such compensation is not set by statute. No statutory reference to compensation exists, nor is any language used that would suggest compensation, such as "terms" of employment.

The FLRA argues, however, that "[t]here is no express exclusion of wages and fringe benefits" from the definition of bargainable matters under the statute. This view stands the inquiry on its head and presupposes that wages are a bargainable item in the first place. It is for Congress to affirmatively denominate a subject as one for collective bargaining. Statutory text is a more reliable guide for judicial

interpretation than is statutory silence. In the absence of an affirmative congressional expression, we refuse to expand the scope of bargaining by implication to include employee compensation. Such an important matter as bargaining over wages should not be left to vague intimation or oblique reference.

No intent to permit general public-sector wage bargaining is evident in the language, structure, or legislative history of Title VII. As to language, Title VII's definition of "conditions of employment" must be read against the background of other collective bargaining schemes such as the National Labor Relations Act (NLRA). *See* 29 U.S.C. §§ 151 *et seq.* Significantly, the scope of collective bargaining under the NLRA extends to "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Congress was fully cognizant of the NLRA when Title VII was enacted, *see* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 41-42 & 50 (1978), *reprinted in Legislative History* at 687-88 & 696; S. Rep. No. 95-969, 95th Cong., 2d Sess. 97 & 106, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2819 & 2828, *and in Legislative History* at 757 & 766, and its use of the term "conditions of employment" rather than the NLRA's broader definition implies a "narrower range of bargainable matters" under Title VII than under the NLRA. *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1416 n.14 (3d Cir. 1988). *But see Fort Stewart Schools v. FLRA*, 860 F.2d 396, 400 (11th Cir. 1988). "In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment," *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring); a defini-

tion which does not include employee pay. Indeed, we are unaware of any other collective bargaining statute which equates "conditions of employment" with employee compensation. *See, e.g.*, 20 U.S.C. § 902(a) (Overseas Pay Act) (distinguishing between "the payment of compensation" and "conditions of employment").

This interpretation of Title VII is supported by the structure of the Civil Service Reform Act. Section 704 of the Act, for example, preserves the collective bargaining rights of those "prevailing rate employees" who negotiated over pay prior to August 19, 1972. *See* Pub. L. No. 95-454, § 704, 92 Stat. 1111, 1218 (1978), *reprinted at* 5 U.S.C. § 5343 note. *See generally* 5 U.S.C. §§ 5342 *et seq.* (Prevailing Rate Act of 1972). Section 704(a) of the provision refers to "terms and conditions of employment and other employment benefits"; subsection (b) refers to the "pay and pay practices" of prevailing rate employees. *See* Pub. L. No. 95-454, § 704, 92 Stat. 1111, 1218 (1978), *reprinted at* 5 U.S.C. § 5343 note. Congress therefore knows how to grant federal employees the express right to bargain collectively over their pay when it wishes to do so. *See also* Pub. L. No. 92-392, § 9(b), 86 Stat. 564, 574 *reprinted at* 5 U.S.C. § 5343 note (Prevailing Rate Act of 1972) referring to "wages, the terms and conditions of employment, and other employment benefits"); Pub. L. No. 91-375, § 10(a), 84 Stat. 719, 784 (1970), *reprinted at* 39 U.S.C. § 1201 note (Postal Reorganization Act) (requiring the Postmaster General and labor organizations to bargain over "wages, hours and working conditions"). Congress' distinction in § 704 between "pay and pay practices" and "terms and conditions of employment and

other employment benefits" is thus an indication of its intent that the statutory term "conditions of employment" does not include employee compensation. *See Sealift*, 836 F.2d at 1420.

We agree with the Third Circuit that the Act's legislative history is also "replete" with indications that Congress did not intend to subject employee compensation to collective bargaining. *Id.* at 1416. As originally proposed in the House of Representatives, the public sector labor relations program required federal agencies and employee organizations to "bargain in a good-faith effort to reach agreement with respect to the terms *and* conditions of employment." H.R. 9094, 95th Cong., 1st Sess. (1977) (emphasis added), *reprinted in Legislative History* at 243. "Conditions of employment" expressly included "pay practices." *Id.* at 244. During committee markup of the bill, Representative Heftel of Hawaii introduced an amendment which also defined the scope of bargaining to include "pay practices." *Legislative History* at 1087-88. When the bill was reported out of committee, however, the scope of the bargaining obligation had been significantly narrowed. As reported and enacted, the duty to bargain extended only to "conditions of employment," and did not expressly include employee compensation. Pub. L. No. 95-454, § 7103, 92 Stat. 1111, 1194 (1978), *codified at* 5 U.S.C. §§ 7103(a)(12) & 7103(a)(14). "Few principles of statutory interpretation are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). We therefore refuse to

imply a bargaining obligation specifically rejected by Congress.

Moreover, the House Committee on Post Office and Civil Service, to which the bill was referred, stated in its report that the public sector labor relations program "does not authorize collective bargaining on substantive issues of pay and fringe benefits." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 5 (1978), *reprinted in Legislative History* at 681. In supplemental views to the House Report, several committee members stated that "[t]hose of our colleagues who are concerned that this bill will significantly expand the collective bargaining rights of Federal employees need not worry. It does not." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 377 (1978), *reprinted in Legislative History* at 721. The authors of these supplemental views were expressing their disappointment that the scope of bargaining was narrowly defined in the committee bill and excluded "pay and major money-related fringe benefits from the bargaining table." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 378 (1978), *reprinted in Legislative History* at 722. Similarly, the Senate Committee on Governmental Affairs recognized that Title VII excluded bargaining on "economic matters." S. Rep. No. 95-969, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2735, *and in Legislative History* at 750.

Furthermore, Representative Clay of Missouri, a member of the Committee on Post Office and Civil Service, assured his colleagues that there was "nothing in this bill which allows Federal employees the right . . . to negotiate over pay and money-related fringe benefits." 124 Cong. Rec. H8,466 (daily ed. Aug. 11, 1978), *reprinted in Legislative History* at

853. *See also* 124 Cong. Rec. E4,510 (daily ed. Aug. 10, 1978) (remarks of Rep. Clay) the committee markup bill contained "no provision for the negotiation of pay and other money related fringe benefits"), *reprinted in Legislative History* at 845; 124 Cong. Rec. E4,293 (daily ed. Aug. 3, 1978) (remarks of Rep. Clay ("employees still . . . cannot bargain over pay"), *reprinted in Legislative History* at 839. Representative Derwinski of Illinois remarked that wages "would remain beyond the scope of collective bargaining." 124 Cong. Rec. H9,639 (daily ed. Sept. 13, 1978), *reprinted in Legislative History* at 935. *See also* 124 Cong. Rec. H9,669 (daily ed. Sept. 13, 1978) (remarks of Rep. Fisher of Virginia) (the bill "does not contain such controversial features as the right to . . . bargain for pay and benefits"), *reprinted in Legislative History* at 964. Likewise, Senator Sasser of Tennessee, a member of the Committee on Governmental Affairs, recognized that under the proposed legislation federal employees "may not bargain over pay or fringe benefits." 124 Cong. Rec. S14,281 (daily ed. Aug. 24, 1978), *reprinted in Legislative History* at 1014.

Significantly, Representative Udall of Arizona, who sponsored the amended version of Title VII which Congress ultimately enacted into law, stated that "[t]here is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through Congressional action." 124 Cong. Rec. H9,633 (daily ed. Sept. 13, 1978), *reprinted in Legislative History* at 923. His remarks, as those of the amendment's sponsor, are an "authoritative guide" to its construction, *North Haven Bd. of Edu-*

cation v. Bell, 456 U.S. 512, 526-27 (1982), and illustrate that Title VII does "not permit bargaining over pay and fringe benefits." 124 Cong. Rec. H8,462 (daily ed. Aug. 11, 1978) (remarks of Rep. Udall), *reprinted in Legislative History* at 850. *See generally Sealift*, 836 F.2d at 1417-19.

While the Authority contends that the legislative history is "ambiguous," we think it could not be more clear. The legislative history of the Act indicates that the term "conditions of employment" does not include employee compensation and that employee compensation therefore falls outside Title VII's duty to bargain.

We recognize, of course, that the FLRA is entitled to deference when applying the provisions of the Civil Service Reform Act, *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983), but we must determine whether the agency's interpretation of the statute comports with congressional intent. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). *See also* 5 U.S.C. § 706 ("reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions"). Congress' intent "is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Here, the relevant statutory provisions of the Act must therefore "get their final meaning from judicial construction." *See Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), *citing Federal Trade Commission v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934). In this regard, it would be reckless for a federal court to impute to Congress an unexpressed intention to allow others to reorder the priorities and

limitations placed upon federal agencies by Congress itself. Historically, Congress and the Chief Executive have borne primary responsibility for the federal budgetary process. To follow the interpretation of the FLRA in this instance is to effect a judicial withdrawal of political accountability in public-sector compensation that substitutes for the competitive pressures constraining private-sector collective bargaining.

We believe the FLRA has misconstrued Title VII and undermined Congress' intent by ordering the NRC to bargain over employee wages and salaries. Employee compensation is nonnegotiable in the absence of express congressional authorization to the contrary.

III.

Regardless of whether employee compensation is within the scope of Title VII's bargaining obligation, the NRC contends that it cannot be required to negotiate over the union's salary proposal. The NRC asserts that such a duty to bargain would interfere with the agency's right to determine its own budget under Title VII's management rights clause, *see* 5 U.S.C. § 7106(a)(1), and would be inconsistent with § 161(d) of the Atomic Energy Act. *See* 42 U.S.C. § 2201(d). These contentions present persuasive alternative grounds for denying enforcement of the FLRA order.

Our concurring brother believes that it is unnecessary to reach these alternative grounds of decision. We, however, believe that it is proper to address them because both the FLRA and the panel opinion relied upon them and because they were briefed and argued at length before this court.

A.

The undeniable aim of Congress to prescribe in Title VII the rights of federal employees was not meant to come at the expense of an "effective and efficient Government." 5 U.S.C. § 7101(b). Congress therefore used broad and emphatic language in § 7106 in an attempt to strengthen the management power of federal agencies. *See Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92; *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 560 (D.C. Cir. 1982). Title VII included a "broad statement of management rights," H.R. Rep. No. 95-1403, 95th Cong., 2d. Sess. 12 (1978), *reprinted in Legislative History* at 682, in which Congress "specifie[d] areas for decision which are reserved to the President and heads of agencies, which are not subject to the collective bargaining process." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12-13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2734, *and in Legislative History* at 749-50. In addition to granting federal employees "greater rights in labor relations," 124 Cong. Rec. H8,462 (daily ed. Aug. 11, 1978) (remarks of Rep. Udall), *reprinted in Legislative History* at 850, Title VII also gave management "the power to manage and the flexibility it needs." 124 Cong. Rec. H9,633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall), *reprinted in Legislative History* at 923.

With certain exceptions not relevant here, an agency therefore "may not bargain away" its authority to make decisions in those areas specified in § 7106(a)(1), including its authority to determine the agency's budget. *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 43 (1978), *reprinted in Legislative History* at 689. Although Title VII imposes a

broad duty to bargain, it also demarcates an area of management prerogative which Congress protected in order "to preserve the Federal Government's ability to operate in an effective and efficient manner." *National Treasury Employees Union*, 691 F.2d at 560. Congress expressly recognized the paramount importance of an agency's right to determine its budget, 5 U.S.C. § 7106(a)(1), and designated it a matter on which an agency and an employee organization "may not negotiate under any circumstances." H. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 153, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 2887, *and in Legislative History* at 821. *See also* 124 Cong. Rec. S14,271 (daily ed. Aug. 24, 1978) (remarks of Sen. Percy), *reprinted in Legislative History* at 1012 (agency budgets are "specifically excluded from the scope of bargaining"). The management rights clause provides that "nothing in this chapter shall affect the authority of any management official of any agency" to exercise certain management prerogatives, including the authority to determine the agency's budget. 5 U.S.C. § 7106(a)(1). Because the union's salary proposal would interfere with this prerogative, it is perforce nonnegotiable.

Here, the FLRA contends that the union's salary proposal does not violate the management rights clause because the proposal does not prescribe a specific dollar amount to be allocated in the NRC's budget. According to the FLRA, the union's proposal "merely establishes a formula for adjusting [employee] salaries" and is therefore within the NRC's duty to bargain. We reject this argument. Although the union's salary proposal does not prescribe a specific dollar amount, it does provide a formula which ultimately will dictate a specific dollar amount to be

allocated in the NRC's budget each time the Advisory Committee on Federal pay recommends a cost-of-living adjustment to Congress and the President.

Moreover, if the union's salary proposal becomes part of the collective bargaining agreement, it will divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay. The union's salary proposal would thus clearly "affect" the NRC's authority to determine its own budget and is therefore nonnegotiable. *See* 5 U.S.C. § 7106(a)(1). Specifically, the NRC would be obligated to negotiate in good faith over the union's salary proposal if it is a subject of mandatory bargaining. Title VII provides for binding resolution of contract disputes and the proposal may well become a provision of the collective bargaining agreement over the agency's objection. *See* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C). As such, the NRC would be obligated to adjust its employees' wages and salaries each time the Advisory Committee on Federal pay recommends a general increase in federal salaries. Significantly, such salary adjustments would not be subject either to the views of the agency or the actions of Congress because, by its terms, the proposal's automatic salary adjustments would be "unaffected by Presidential or Congressional actions."

This result would significantly affect the NRC's operations. Salaries, and benefits based upon those salaries, constitute more than forty percent of the NRC's annual budget. The union's proposal would vest a third-party with absolute authority to determine salary increases and would require the NRC to somehow absorb unfunded millions of dollars in salary adjustments. While the FLRA contends that the

agency has failed to demonstrate that the anticipated increase in costs is significant and not offset by compensating benefits, nothing in the statute requires that this showing be made to the satisfaction of the FLRA. As applied to employee compensation, the FLRA's test makes itself, not the agency, the arbiter of the agency's budget. Congress, however, has vested the NRC with the responsibility of balancing employee compensation against the agency's other goals. Congress did not vest this authority either in the FLRA or the Advisory Committee on Federal Pay. Title VII of the Act is quite specific: "*nothing* in this chapter shall *affect*" an agency's authority to make budget determinations. 5 U.S.C. § 7106(a)(1) (emphasis added). The union's salary proposal would divest the NRC of substantive decisionmaking authority over its budget and is therefore nonnegotiable pursuant to Title VII's management rights clause.

B.

Finally, Title VII of the Act further restricts an agency's duty to bargain by precluding negotiations over contract proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). Here, the union's salary proposal conflicts with § 161(d) of the Atomic Energy Act (AEA); it is therefore nonnegotiable.

In the performance of its functions, the NRC is authorized by § 161(d) of the AEA to:

> appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and

> their compensation fixed in accordance with [the Classification Act of 1949], except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws. . . .

42 U.S.C. § 2201(d). Pursuant to this statutory provision, the NRC elected in 1975 to exempt its employees from the general requirements of the Classification Act. The FLRA contends that this election now provides the NRC with virtually unlimited discretion over the salaries and wages of NRC employees. The FLRA found that requiring the NRC to bargain over the union's salary proposal would not be inconsistent with § 161(d).

Again we disagree. Nothing in § 161(d) requires the NRC to bargain over wages or renders inapplicable those sections of the Civil Service Reform Act which define the scope of an agency's bargaining obligation. At most, § 161(d) is a limited grant of authority to the NRC designed to attract individuals whose talents and expertise would assist the agency in the performance of its mission. *See* 42 U.S.C. § 2201(d). Section 161(d) and the NRC's 1975 decision to opt out of the Classification Act scheme do not provide the agency with unfettered discretion to negotiate over employee compensation. The AEA specifically limits the NRC's discretion and the agency may deviate from the general civil service laws only "to the extent the Commission deems such action necessary to the discharge of its responsibilities." 42 U.S.C. § 2201(d). The NRC has never made the requisite determination that it is necessary to depart significantly from general government pay rates. To the contrary, the NRC's present compensa-

tion scheme closely parallels that found in the Classification Act. Nothing in the statute supports the Authority's conclusion that once the NRC decides some deviation from the Classification Act is required, that the agency thereby becomes obligated to negotiate broadly over pay schedules.

If the union's salary proposal becomes binding on the NRC, *see* 5 U.S.C. §§ 7119(b), 7119(c)(5)(B) & 7119(c)(5)(C), the agency may be required to compensate its employees at levels above which it believes are necessary to the discharge of its duties. The agency's implementation of its statutory obligations would in fact be significantly restricted, for the salary proposal would vest in the Advisory Committee on Federal Pay the agency's right to determine whether wage costs are justified by corresponding benefits. Thus, under the FLRA's interpretation of § 161(d), what Congress intended as a provision to grant the NRC marginally greater discretion would actually leave the agency with less discretion in the exercise of its responsibilities. Such a result would be contrary to a plain reading of § 161(d), *see* 42 U.S.C. § 2201(d), and Title VII of the Act expressly excludes matters from collective bargaining which are inconsistent with federal law. *See* 5 U.S.C. § 7117(a).

In reviewing the NRC's enabling act, we are not bound by the FLRA's construction of the statute. *See Department of the Treasury, Bureau of Engraving & Printing v. FLRA*, 838 F.2d 1341, 1342, n.* (D.C. Cir. 1988). We may engage in *de novo* review of the FLRA's interpretation of another agency's enabling act, and, in this case, we defer to the NRC's "permissible construction" of the AEA. *See Chevron*, 467 U.S. at 843. According to the NRC, it may not

depart from general government pay rates until it determines that such a departure is necessary to the discharge of its responsibilities. No such determination has been made here and the union's salary proposal is therefore nonnegotiable.

IV.

In sum, we hold that employee compensation is not a "condition of employment" as defined by Congress in 5 U.S.C. § 7103(a)(14). Moreover, the union's salary proposal is "inconsistent" with federal law, *see* 42 U.S.C. § 2201(d), interferes with the NRC's authority to determine its budget, and is therefore nonnegotiable. *See* 5 U.S.C. §§ 7106(a)(1) & 7117(a)(1). We grant the NRC's petition for review, reverse the decision of the FLRA, and deny enforcement of the FLRA's bargaining order.

ENFORCEMENT DENIED.

HALL, Circuit Judge, concurring:

Judge Wilkinson has demonstrated persuasively in Sections I and II of his opinion that absent an express congressional mandate to the contrary, matters of employee compensation are not, and were never intended to be, negotiable under the Civil Service Reform Act. Accordingly, I join in these portions of the opinion and concur in the denial of enforcement of the FLRA's bargaining order.

However, I cannot join in Section III of the opinion which discusses alternative grounds for reversing the FLRA, namely the budgetary rights issue under § 7106(a)(1) of the Civil Service Reform Act and the possible conflict between the union's salary pro-

posal and § 161(d) of the Atomic Energy Act. My decision to not join in this portion of the opinion in no way reflects my views on the merits of these issues. Rather, because our determination that matters are nonnegotiable conclusively resolves the dispute in this case, I see no need to reach these other issues.

PHILLIPS, Circuit Judge, dissenting:

For reasons sufficiently given in the superseded panel opinion, 859 F.2d 302, and in the decisions in accord of the Second Circuit in *West Point Elementary School Teachers Ass'n v. FLRA*, 855 F.2d 936 (2d Cir. 1988), and the Eleventh Circuit in *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988), I respectfully dissent and would enforce the FLRA's bargaining order.

Chief Judge Ervin, Judge Murnaghan and Judge Sprouse have asked to be shown as joining in this dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 87-3182

NUCLEAR REGULATORY COMMISSION, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

Argued May 5, 1988

Decided Oct. 5, 1988

On Petition for Review and Cross-Application
for Enforcement of an Order of the
Federal Labor Relations Authority

Dennis C. Dambly, Deputy Asst. Gen. Counsel for Admin. (William H. Briggs, Jr., Sol., E. Leo Slaggie, Deputy Sol., Marvin L. Itzkowitz, Sr. Counsel for Labor and Personnel, Mary K. Hembree, Office of the Gen. Counsel, U.S. Nuclear Regulatory Com'n, Washington, D.C., on brief), for petitioner.

Jill A. Griffin (Ruth E. Peters, Sol., William E. Persina, Deputy Sol., Federal Labor Relations Authority, Washington, D.C., on brief), for respondent.

Gregory O'Duden, Deputy Director of Litigation (Lois G. Williams, Director of Litigation, National Treasury Employees Union, Washington, D.C., on brief), for intervenor.

Before PHILLIPS and SPROUSE, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge:

The Nuclear Regulatory Commission (NRC) is before this court on a petition for review of a bargaining order of the Federal Labor Relations Authority (FLRA). The FLRA has cross-petitioned for enforcement of its order and the National Treasury Employee's Union (NTEU) has been permitted to intervene. We have jurisdiction over the NRC's petition for review and the FLRA's cross-petition for enforcement under § 7123 of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 7123 (1982). In its order, the FLRA found that the NRC was obligated under 5 U.S.C. § 7102(2) to bargain in good faith over a salary proposal advanced by the NTEU during collective bargaining. We agree. Accordingly, we deny the petition for review, affirm the decision of the FLRA, and grant the cross-petition for enforcement of the FLRA's bargaining order.

I

The NTEU is the exclusive representative of all nonmanagerial, nonsupervisory, and nonconfidential professional, nonprofessional and wage-grade employ-

ees of the NRC. In October 1984, during collective bargaining, the NTEU presented the following proposal to the NRC:

> Section 52.1
>
> The salary structure, that is the grade and steps of the pay schedule, being used by the NRC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the Pay Advisory Council.[1]
>
> This adjustment will become effective at the beginning of the first pay period following the announcement of it by the Council or other appropriate sources. It will be unaffected by Presidential or Congressional actions.
>
> Section 52.2
>
> NTEU agrees to establish with the employer a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity of the employer, e.g., decrease employee turnover, remove work obstacles, improve upon available machines and procedures, and raise employee morale.

The NRC refused to bargain and served the NTEU with a written allegation of non-negotiability, *see* 5 U.S.C. § 7117(c), on October 5, 1985. The NTEU,

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[1] The FLRA concluded and the parties agree that by "Pay Advisory Council" the proposal is referring to the Advisory Committee on Federal Pay, functioning pursuant to 5 U.S.C. § 5306.

however, did not until February 25, 1986, formally request a written allegation of nonnegotiability regarding the proposal which the NRC then again provided the NTEU on March 6, 1986. On March 20, 1986, the NTEU filed a petition for review of the NRC's nonnegotiability determination, pursuant to 5 U.S.C. § 7117.

Before the FLRA, the NRC asserted several grounds for its refusal to bargain over the NTEU's proposal. First, the NRC argued that the NTEU's petition for review was untimely under 5 U.S.C. § 7117(c) because that provision required the petition for review to be filed within 15 days of the NRC's original written allegation of nonnegotiability.

On the merits, the NRC argued that the NTEU's proposal is nonnegotiable because it is "inconsistent with Federal law," 5 U.S.C. § 7117(a), namely with § 161(d) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2201(d), which, in pertinent part, provides that the NRC's employees' compensation is to be

> fixed in accordance with [the Classification Act of 1949, as amended] chapter 51 and subchapter III of chapter 53 of Title 5, except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws.

Id. Alternatively, the NRC contended that Congress never intended federal employees wages to be negotiable "conditions of employment" under §§ 7102 (2) and 7103(a)(14) of the CSRA and that such matters are, generally, nonnegotiable "unless a given statute clearly indicates to the contrary." The absence of such a statute with regard to the NRC's em-

ployees, it was argued, rendered their salaries non-negotiable under the general rule. Finally, the NRC contended that the NTEU's proposal conflicted with the NRC's "management right" to determine its budget, a right protected by § 7106(a)(1) of the CSRA, 5 U.S.C. § 7106(a)(1), and was not therefore properly the subject of collective bargaining.

The FLRA found that the NTEU's petition for review was timely, rejected each of the NRC's substantive objections to the proposal's negotiability, and ordered that the NRC bargain over the NTEU's proposal. This petition and cross-petition for review followed.

II

As a preliminary matter, it is necessary to address the NRC's reiterated assertion that the NTEU's petition for review before the FLRA was untimely. Section 7117(c) of the CSRA, 5 U.S.C. § 7117(c)(1) and (2) provides:

> (c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.
>
> (2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—
>
> (A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

Pursuant to its rulemaking power under § 7134 of the CSRA, the FLRA promulgated the following regulation, implementing the § 7117(c) time limits:

> The time limit for filing a petition for review is fifteen (15) days after the date the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the exclusive representative. The exclusive representative shall request such allegation in writing and the agency shall make the allegation in writing and serve a copy on the exclusive representative: *Provided, however,* That review of a negotiability issue may be requested by an exclusive representative under this subpart without a prior written allegation by the agency if the agency has not served such allegation upon the exclusive representative within ten (10) days after the date of the receipt by any agency bargaining representative at the negotiations of a written request for such allegation.

5 C.F.R. § 2424.3 (1980). The FLRA has interpreted both § 7117(c) and § 2424.3 as providing that only an allegation of nonnegotiability tendered in response to a written request for such allegation starts the clock running on the fifteen day period for filing a petition for review with the FLRA. The NRC argues that this interpretation directly conflicts with § 7117(c) and should therefore be overturned. We disagree.

A

It is by now well established that the FLRA is "entitled to considerable deference when it exercises its 'special function of applying the general provisions of the [Civil Service Reform] Act to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983) (*BATF*) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963). Equally clear is the principle that "while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling act . . . they must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " 464 U.S. at 97, 104 S.Ct. at 444 (citations omitted). Nevertheless, this court must sustain the FLRA's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise unlawful." *American Fed'n of Gov't Employees, AFL-CIO, Local 2303 v. FLRA*, 815 F.2d 718, 719 (D.C. Cir. 1987); *see* 5 U.S.C. § 706.

B

Guided by the foregoing principles we find the FLRA's interpretation of § 7117(c) to be eminently reasonable. Section 7117(c) merely indicates that an agency may "allege" that a given matter is not the proper subject of collective bargaining and that within fifteen days after the "allegation" is made, an appeal may be instituted. The FLRA's implementing regulation, § 2424.3, and case interpretation of the statute, *see American Fed'n of Gov't Employees,*

AFL-CIO, Local 3385 and Fed. Home Loan Bank Bd., Dist. 7, 7 F.L.R.A. 398 (1981), and the regulation merely flesh out the definition of "allegation" in a manner consistent with the statutory purpose. If the NRC's interpretation of "allegation" were to be accepted, mere statements regarding negotiability made during collective bargaining might force a union to institute review proceedings in order to preserve its right to review. The FLRA persuasively argues that this would be inconsistent with the statute's policy of facilitating collective bargaining. An exclusive representative would repeatedly be forced to institute review proceedings prior to determining whether a given proposal was worth fighting for as written or could be amended to meet both the union's and the agency's needs. The FLRA has permissibly construed § 7117(c) as providing that the triggering of the formal review process is best left in the hands of the union if the collective bargaining process is not to be broken down in a "fruitless cycle of agency objection and appeal." *Local 2303*, 815 F.2d at 722. We therefore decline to overturn the FLRA's interpretation of § 7117(c). *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (*Chevron*).

III

Turning now to the merits of the NRC's petition for review, we address in order, the NRC's contentions that the NTEU's proposal is nonnegotiable as "inconsistent with federal law"; as excluded from the "conditions of employment" over which an agency is required to negotiate; and as an infringement on the NRC's right to determine its budget.

A

Section 7102 of the CSRA gives federal employees the right to unionize and engage in collective bargaining with respect to "conditions of employment." 5 U.S.C. § 7102. Both federal agencies and labor organizations are required, under the CSRA, to bargain in good faith over the "conditions of employment" unless the statute otherwise exempts them from the obligation. *See* 5 U.S.C. §§ 7102, 7103(a)(14), 7114, 7116(a)(5) and (b)(5), 7117. One such exemption is contained in § 7117 of the CSRA which the parties agree prohibits bargaining over union proposals where to do so would be "inconsistent with federal law." [2]

The NRC argues that bargaining over the NTEU's proposal would be inconsistent with § 161(d) of the AEA, 42 U.S.C. § 2201(d), which in relevant part provides:

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[2] Section 7117, in relevant part, provides:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

5 U.S.C. § 7117(a)(1) and (2).

> In the performance of its functions the Commission is authorized to—
>
> d. appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with . . . [the Classification Act of 1949, as amended] except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws. . . .[3]

The NRC admits that in 1975, upon its creation as a successor to the Atomic Energy Commission (AEC), it informed the Civil Service Commission of

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[3] The Classification Act of 1949 is now referenced in the statute as "chapter 51 and subchapter III of chapter 53 of Title 5." Section 161(d) further provides:

> *Provided, however,* That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule) whose position would be subject to [the Classification Act of 1949, as amended], if such [Act] were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such [Act] for positions of equivalent difficulty or responsibility . . . .

42 U.S.C. § 2201(d). The FLRA found and the parties agree that the legal limits imposed on NRC employees' salaries in this portion of § 161(d) are not relevant to the present appeal because the proposal is to be construed as limited consistent with the statutory constraints.

its election, pursuant to § 161(d), to continue the AEC's practice of exempting all positions within the agency from the requirements of the civil service laws and the Classification Act. However, the NRC argues that "by generally exempting its positions from the Classification Act of 1949, as amended, the [NRC] did not make the finding required by section 161(d) to enable it to deviate from the general civil service pay schedules." In other words, the NRC interprets § 161(d) as providing that "no discretion to depart from General Schedule pay rates is allowed until the Commission makes a finding that the departure is necessary to the discharge of its responsibilities and then such departure can only be to the extent necessary to discharge its responsibilities." Considering its discretion over its employees' salaries to be so limited by Congressional directive, the NRC argues that the duty to bargain over the NTEU's salary proposal would be inconsistent with § 161(d).

The FLRA rejected the NRC's interpretation of § 161(d), and found instead that the language in § 161(d) relied upon by the NRC in finding its discretion congressionally circumscribed actually places no specific limit on the NRC's discretion to bargain over the NTEU's proposal. The FLRA then held that the unlimited discretion over the NRC employee's wages and salaries vested in the NRC as a result of its exemption election carries with it the duty to bargain in good faith over the NTEU's salary proposal. In short, the FLRA interprets § 161(d) as only placing limits on the NRC's discretion to exempt its positions from the civil service laws and Classification Act. Once the election is made, as here it concededly has been, the FLRA considers the NRC to be left

with unbridled discretion over its employees' wages and salaries.[4]

Although, in resolving this conflict over the proper interpretation of § 161(d), we are mindful that considerable deference is due the construction which the NRC has placed on its enabling act, the Atomic Energy Act, *see* 42 U.S.C. § 2201, we find the NRC's interpretation to be an unresonable construction of § 161(d) and flatly contrary to that section's plain language. The FLRA's interpretation on the other hand, while not entitled to equal deference, *compare Shanty Town Assoc. Ltd. v. EPA*, 843 F.2d 782, 790 n. 12 (4th Cir. 1988) (holding that court is not required to defer to agency's interpretation of enabling acts other than its own) *with United States Dept. of Health & Human Services v. FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987) (holding that FLRA interpretations of statutes other than CSRA are entitled to deference where "interpretation bears directly on the 'complexities' of federal labor relations"), is in accord with the plain language of § 161(d). Section 161(d) clearly gives the NRC the authority to exempt its positions from the civil service laws and the Classification Act "to the extent necessary to the discharge of its responsibilities." This clause cannot be read to limit the NRC's discretion over its employees' pay once the decision to exempt has been effectuated. The NRC offers no legislative history, and we know of none, to the contrary. As the final arbiter of issues of statutory construction, *FTC v. Colgate-Palmolive Co.*, 380 U.S.

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[4] Again, the parties agree that the NTEU's salary proposal is to be construed consistently with the legal limits § 161(d) places on NRC employees' salaries. These legal limits are not, therefore, viewed as limits on the NRC's discretion.

374, 385, 85 S. Ct. 1035, 1043, 13 L.Ed.2d 904 (1965), we cannot give effect to an agency's interpretation of a statute that is "manifestly contrary" to that statute's plain language. *See Chevron*, 467 U.S. at 843-45, 104 S. Ct. at 2781-83.

In urging this court to find the NTEU's proposal inconsistent with § 161(d), the NRC relies heavily on the Third Circuit's recent decision in *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (1988) *(Sealift)*. There, the court held that proposals relating to the pay of civilian mariners were nonnegotiable because the mariners' positions were governed by the Prevailing Rate Act, 5 U.S.C. § 5348(a) (1982), which, in relevant part, provides that their pay "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry." The court reasoned that bargaining over pay related proposals would be inconsistent with the congressional directive that the Navy assess and resolve competing public interest concerns prior to adjusting the mariners' pay. 836 F.2d at 1415-17. The FLRA correctly contends that the Third Circuit's resolution of the statutory conflict in *Sealift* has no bearing on the present appeal. Not only are the NRC's employees not governed by the Prevailing Rate Act, but the language of § 161(d), as we have already held, places no limit on the NRC's bargaining discretion similar to that before the court in *Sealift*.[5] We therefore uphold the FLRA's finding that the NRC is not exempted from

[5] The D.C. Circuit's recent decision, adopting the Third Circuit's reasoning in *Sealift*, is similarly distinguishable. *See Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 838 F.2d 1341, 1342-43 (D.C. Cir. 1988).

its duty to bargain in good faith over the NTEU's proposals by virtue of any inconsistency of this duty with § 161(d) of the Atomic Energy Act.

B

Again relying on *Sealift*, the NRC offers an alternative ground for finding the FLRA's bargaining order unenforceable as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) (stating standard of review of FLRA order). The *Sealift* court, having already sufficiently concluded that bargaining over the relevant pay related proposal was inconsistent with § 5348(a) of the Prevailing Rate Act, and therefore nonnegotiable under § 7117 of the CSRA, went on to hold that unless a federal statute specifically provides to the contrary, the wages and salaries of federal employees are nonnegotiable. *See* 836 F.2d at 1419. With respect, we disagree.

Again, § 7102 of the CSRA obligates the NRC to bargain with the NTEU with respect to "conditions of employment," 5 U.S.C. § 7102, that are not exempted from the bargaining process under § 7117. Congress defined "conditions of employment" as:

> (14) . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or

> (C) to the extent such matters are specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14). While recognizing that the wages and fringe benefits of most federal employees are "specifically provided for by Federal Statute," the FLRA has held that:

> [T]he definition of the scope of bargaining which is embodied in the [CSRA] is perfectly clear. Under that definition, and consistent with practice under the Executive Order, substantive proposals regarding pay and fringe benefits which are not specifically provided for by Federal Statute, and any other conditions of employment are negotiable to the extent they are not inconsistent with applicable laws, rules and regulations if the matters proposed are within an agency's discretion. . . . Ambiguous legislative history does not compel a different conclusion.[6]

American Fed'n of Gov't Employees, AFL-CIO, Local 1897 and Dept. of the Air Force, Eglin Air Force Base, Florida, 24 F.L.R.A. 377, 383 (1986) (citations omitted) (*Eglin*). The FLRA applied its holding in *Eglin* to the NRC's and NTEU's dispute and found sufficient discretion in the NRC over its employees' salaries to mandate bargaining.

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[6] Prior to enactment of CSRA, federal employment matters were governed by Executive Orders. *See BATF v. FLRA*, 464 U.S. 89, 91, 104 S.Ct. 439, 441, 78 L.Ed.2d 195 (1983). Under this regime, the FLRA's predecessor, the Federal Labor Relations Council found pay matters to be negotiable unless provided for by law or in conflict with an agency rule or regulation. *See Eglin*, 24 F.L.R.A. at 381.

We consider the FLRA's interpretation of the CSRA and its legislative history to be a wholly "reasonable accommodation of conflicting policies that were committed to its care by the [CSRA]." *Shanty Town Assoc. Ltd. v. EPA*, 843 F.2d 782, 790 (4th Cir. 1988). "[W]e are not at liberty to reject it merely because we might have reached a different conclusion if confronted with the issue in the first instance." *Id.* (citing *Chevron*, 467 U.S. at 843-44 & n. 11, 104 S.Ct. at 2781-82 & n. 11). This court has consistently recognized the special deference due the FLRA's exercise of its " 'special function of applying the general provisions of the [CSRA] to the complexities' of federal labor relations." *United States Dept. of Health and Human Services v. FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987) (quoting *BATF*, 464 U.S. at 97, 104 S.Ct. at 444).

Faced with this same issue of whether federal employee pay related proposals are negotiable under the CSRA, a panel of this court recently unanimously held that a federal agency has "a general duty under 5 U.S.C. § 7117(a) to bargain in good faith over the wages of its employees" provided that the employees' pay is not specifically provided for by statute and the proposal is not otherwise exempt from negotiation under § 7117. *United States Dept. of Defense Dependent Schools, Fort Bragg, North Carolina v. FLRA*, No. 87-3061, slip op. at 4 (4th Cir. Feb. 3, 1988) (initially published at 838 F.2d 129) (Murnaghan, J., dissenting on other grounds). The panel opinion, during the pendency of the present appeal was, however, vacated as moot, *see* 838 F.2d 129, 130-38 (4th Cir. 1988), and we must, therefore, address this issue anew. Although the panel opinion in *Fort Bragg* is not binding on us, we find the rea-

soning expressed therein persuasive. *See Fort Bragg*, slip op. at 13-15 (Murnaghan, J., dissenting on other grounds).

As the FLRA held in the present case, and as was noted in *Fort Bragg, id.*, the argument that Congress did not intend federal employee wages to be negotiable as conditions of employment is based on a few isolated and ambiguous statements in the CSRA's legislative history. In particular, the NRC points out that Congressman Udall, one of the bill's chief sponsors, stated that "regulations about wages and hours . . . will continue to be established by law through congressional action." 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978). Congressman Clay, another of the CSRA's sponsors, stated that "there is nothing in this bill which allows Federal employees the right to . . . negotiate over pay and money-related fringe benefits." 124 Cong. Rec. H8466 (daily ed. Aug. 11, 1978). In a similar vein, the House Report on the CSRA stated that "Federal pay will continue to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 12 (1978). Congressman Clay also stated, in support of the Udall version of Title VII of the CSRA ultimately enacted into law:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particu-

> lar subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong.Rec. H9638 (daily ed. Sept. 13, 1978).

The legislative history of Title VII of the CSRA is clearly ambiguous, as the FLRA has concluded, on the matter of negotiability of federal employee pay-related proposals. Faced with the ambiguous remarks of the CSRA's sponsors, which on the one hand suggest that pay is generally nonnegotiable but on the other suggest that pay is negotiable if not specifically provided for by law, the FLRA reasonably concluded that the plain language of the CSRA, in light of the Act's policy of encouraging collective bargaining, indicated a Congressional intent that wages, as "matters . . . affecting working conditions," 5 U.S.C. § 7103(a)(14), be generally negotiable if not otherwise exempted from negotiation under sections 7103 and 7117.[7] "An ambiguous legislative his-

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[7] The NRC argues that the use of the single phrase "conditions of employment" in the CSRA indicates that Congress intended to exclude wages from negotiable matter because in § 158(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (1982), Congress specified that bargaining was required "with respect to wages, hours and other terms and conditions of employment." Because Congress had the NLRA in mind while drafting the CSRA, the NRC argues, the deletion of "wages" from the defined bargaining duty is significant. Although the Third Circuit agrees with this interpretation of the omission, *see* 836 F.2d at 1416 n. 14, we find the import clearly to the contrary. The use of the connecting word "other" in the NLRA suggests that Congress considers wages, among other things, to be conditions of employment.

tory . . . will not suffice to displace the FLRA's reasonable construction of the Act's language." *American Fed'n of Gov't Employees, Locals 225, 1504, and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983). We therefore affirm the FLRA's conclusion that the NRC, vested as it is under § 161(d) with discretion over its employees' wages, has a general duty to bargain over pay-related proposals.

C

The NRC finally argues that the NTEU's proposal interferes with its management right to determine its own budget and is therefore properly considered nonnegotiable under 5 U.S.C. § 7106(a)(1). Section 7106 in relevant part provides:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
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> (1) to determine the . . . budget . . . of the agency
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> . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section. . . .

5 U.S.C. § 7106. The FLRA, in interpreting § 7106, has held that in order to establish nonnegotiability pursuant to § 7106, either an agency must demonstrate that a given proposal "attempt(s) to prescribe the particular programs or operations the agency

would include in its budget or to prescribe the amount to be allocated in the budget for them," or, where a proposal does not so attempt, the agency must "make[] a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits." *American Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base*, 2 F.L.R.A. 604, 607-08 (1980) (*Wright-Patterson*).[8]

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[8] The full explanation of the FLRA's development of the *Wright-Patterson* test bears repeating as demonstrative of the reasonableness of the FLRA's interpretation of § 7106:

> There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition. As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right

In the present case, the FLRA ruled that the NTEU's proposal did not attempt to prescribe a specific amount to be allocated on the NRC's budget. Rather, the FLRA reasoned, the proposal merely suggested a procedure and ultimately a percentage by which NTEU employee salaries might be adjusted to allow for cost of living increases. Because the NRC retained control of the amount of its budget to be allocated for the salaries, the proposal does not prescribe a specific amount which the NRC must allocate in its budget. In other words, as the FLRA has elsewhere stated, the proposal "establishes a percentage of the total . . . cost to be absorbed by the Agency. What that percentage means in terms of the amount to be budgeted depends on factors not covered by the proposal, but within the Agency's control." *Eglin*, 24 F.L.R.A. at 386.

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to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Id. (citations omitted).

While admitting that the NTEU's proposal does not prescribe a specific dollar amount to be allocated in its budget, the NRC argues that the proposal allows a third party, the Advisory Committee on Federal Pay, the authority to determine the salary component of the NRC's budget. This argument does not address the FLRA's conclusion that the proposal merely sets a procedure for adjusting salaries, an item already existing in the NRC's budget and over which the NRC has control. We consider the FLRA's application of § 7106 and the first aspect of the *Wright-Patterson* test to the NTEU's proposal to be a reasonable construction of the CSRA and therefore decline to upset the FLRA's finding in this regard.

The FLRA also analyzed the NTEU's proposal under the second aspect of the *Wright-Patterson* test and held that the NRC had not "made a substantial demonstration that implementation of the proposal will result in a significant, unavoidable increase in costs which is not outweighed by compensating benefits." The FLRA rejected the NRC's contention that the annual cost of living adjustment recommended by the Advisory Committee on Federal Pay,[9] if adopted,[10] would have a substantial unavoidable impact on the

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[9] The parties represent that this increase has averaged a rate of approximately 10% since 1982, and has been more on the order of 5% in more recent years.

[10] Under the CSRA, the parties have a duty to negotiate over a bargainable proposal until an impasse is reached. Section 7119 provides for the resolution of such impasse, including ordering parties to agree to the specific proposal, *see Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984), by the Federal Service Impasses Panel. 5 U.S.C. § 7119.

NRC's ability to determine its budget. The FLRA reasoned that increased cost is only one factor to be considered and that, standing alone, the cost increase that might flow from the NTEU's proposal did not interfere with the NRC's § 7106 budget determination right. Because the NRC failed to even address the issue of compensatory benefits, the FLRA found the NTEU's proposal to be the proper subject of collective bargaining.

We again find the FLRA's construction of § 7106 as applied to the union's proposal to be reasonable. The NRC asks that we construe § 7106 as barring a proposal's negotiability upon a mere showing by an agency of what amounts to less than a five percent increase relative to the agency's total budget.[11] Such a construction of this provision of the CSRA would likely render the vast majority of proposals non-negotiable. Congress intended, however, that § 7106 " 'be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.' " *American Fed'n of Gov't Employees, Local 225, 1504, and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 649 n.36 (D.C. Cir. 1983) (quoting H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 44 (1978)). The FLRA, therefore, reasonably concluded that the NRC must show that any anticipated increase in cost was not offset by benefits such as those outlined in *Wright-Patterson*.[12] The NRC having made no such

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[11] Even were a twenty percent increase recommended in a given year, the worst scenario presented by the NRC in its petition for review, the NRC admits this would amount at most to approximately an eight percent increase in the agency's roughly four hundred million dollar budget.

[12] *See supra* note 8. The NRC appears to argue that this requirement from *Wright-Patterson* is arbitrary and capri-

showing, the FLRA properly found § 7106 to present no bar to the NTEU's proposal's negotiability.

IV

In enacting Title VII of the Civil Service Reform Act, Congress expressed its finding that

> "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 7101(a) (1982 ed.), [and] significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain "an effective and efficient government," § 7101(b).

BATF, 464 U.S. 89, 92, 104 S.Ct. 439, 441 (1983) (footnote omitted). The CSRA created the FLRA and directed that it " 'provide leadership in establishing policies and guidance relating to matters' arising under the Act." *Id.* at 93, 104 S.Ct. at 442. We find that in applying the CSRA to the present negotiability dispute, the FLRA has properly carried out its function under the Act. Accordingly, we deny the petition for review, affirm the decision of the FLRA, and grant enforcement of the FLRA's bargaining order.

SO ORDERED.

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cious. This issue was not raised before the Commission in the first instance and therefore will not be considered by this court. 5 U.S.C. § 7123(c).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-3182

NUCLEAR REGULATORY COMMISSION, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

On Petition for Rehearing and Suggestion for Rehearing In Banc

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The petitioner's petition for rehearing and suggestion for rehearing in banc was submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the April Term of Court. Within ten days of the date of this order 4 additional copies of appellant's briefs, 3 additional copies of appellee's brief, and 4 additional copies of intervenor's brief shall be filed. Petitioner will file 9 additional copies of the joint appendix.

For the Court

JOHN M. GREACEN
Clerk

APPENDIX D

29 FLRA No. 19

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-1250

NATIONAL TREASURY EMPLOYEES UNION, UNION

and

NUCLEAR REGULATORY COMMISSION, AGENCY

DECISION AND ORDER [1]

I. *Statement of the Case*

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single proposal. For the reasons which follow, we find that the proposal is within the duty to bargain under the Statute.

II. *Proposal*

Section 52.1

> The salary structure, that is the grade and steps of the pay schedule, being used by the NRC will

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[1] Chairman Calhoun's dissent follows this opinion.

be maintained. Hereafter, all employees will have their current salaries adjusted for the cost of living/comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the Pay Advisory Council. This adjustment will become effective at the beginning of the first pay period following the announcement of it by the Council or other appropriate sources. It will be unaffected by Presidential or Congressional actions.

Section 52.2

NTEU agrees to establish with the employer a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity of the employer, e.g., decrease employee turnover, remove work obstacles, improve upon available machines and procedures, and raise employee morale.

III. *Positions of the Parties* [2]

The Agency argues, as a threshold matter, that the Union's petition for review was untimely filed under section 7117(c)(2) of the Statute since it was filed more than 15 days after the Agency first made its allegation of non-negotiability. The Agency disagrees with the position taken by the Authority in *American Federation of Government Employees, AFL-CIO, Local 3477 and Commodity Futures Trading Commis-*

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[2] The parties' arguments with respect to the negotiability of the proposal go only to Section 52.1. Section 52.2 does not appear to be in dispute and, therefore, is not specifically addressed in this decision.

sion, 21 FLRA No. 18 (1986) and *American Federation of Government Employees, AFL-CIO, Local 3385 and Federal Home Loan Bank Board, District 7, Chicago, Illinois*, 7 FLRA 398 (1981), that an unsolicited allegation of nonnegotiability does not serve to start the time period running for the filing of a petition for review under section 7117. The Agency urges reconsideration of this policy.

As to the merits, the Agency claims that the proposal is inconsistent with section 161(d) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201, as well as management's right to determine its budget under section 7106(a)(1) of the Statute.

In response, the Union claims that the Agency has failed to substantiate its assertions that the petition for review was untimely filed and that the proposal is outside the duty to bargain. As to the former, the Union argues that in accordance with section 2424.3 of the Authority's Rules and Regulations and Authority precedent, the Agency's unsolicited allegations of nonnegotiability did not serve to trigger the time period for the filing of the petition for review. Rather, it was the Union's request for the allegation which started the time period running.

As to the Agency's arguments on the merits of the proposal, the Union claims that the Atomic Energy Act gives the Agency the discretion to negotiate. The Union states that the proposal is intended to be interpreted consistent with laws that impose limitations on pay. By way of example, the Union cites to pay limitations that are applicable to scientific and technical personnel. Finally, the Union argues that the proposal is not inconsistent with management's right to determine its budget.

IV. *Analysis and Conclusion*

The Agency has not advanced any persuasive reasons to warrant reconsideration of long-standing Authority policy that an unsolicited allegation of nonnegotiability does not commence the time period for filing a petition for review. We therefore reject the Agency's arguments that the Union's petition for review be dismissed on the basis that it was untimely filed.

We also find, for the reasons set forth below, that the Agency has failed to demonstrate that the proposal is either inconsistent with the cited provision of the Atomic Energy Act or section 7106(a)(1) of the Statute.

A. *Alleged inconsistency with law*

First, we will address the arguments made in connection with the Atomic Energy Act. The Agency cites to the following provision of that Act in support of its arguments:

> General Provisions.—In the performance of its functions the Commission is authorized to—
>
> * * * * *
>
> d. appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with the Classification Act of 1949, as amended, except that, *to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws: Pro-*

vided, however, That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended) whose position would be subject to the Classification Act of 1949, as amended, if such Act were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such Act for positions of equivalent difficulty or responsibility. Such rates of compensation may be adopted by the Commission as may be authorized by the Classification Act of 1949, as amended, as of the same date such rates are authorized for positions subject to such act. The Commission shall make adequate provision for administrative review of any determination to dismiss any employee.

The Agency states that it has continued the practice of its predecessor, the Atomic Energy Commission, in exempting all positions within the Agency from coverage under civil service laws and the Classification Act of 1949, as amended. The Agency has adopted a pay system which in many respects parallels general schedule pay rates. The Agency further states that there are three restrictions placed on its pay setting authority that would preclude negotiations over the proposal.

The first restriction concerns the authority of the Agency to deviate from pay schedules to the extent such action is "necessary to the discharge of its responsibilities." The Agency argues that since the authority to make this determination rests with the Agency, it is not subject to negotiation.

The Authority has consistently held that where an agency has discretion over a matter affecting conditions of employment, the agency is obliged under the Statute to exercise that discretion by means of bargaining, unless the discretion is specifically limited by law or regulation. *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA 748, 759-60 (1980). We recently have stated with regard to proposals concerning employee compensation that nothing in the Statute or its legislative history bars negotiations over such proposals where (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists. *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA No. 41 (1986).[3]

We do not view the language of section 161(d) of the Atomic Energy Act which allows the Agency to deviate from pay schedules to the extent such action is "necessary to the discharge of its responsibilities" as placing a specific limitation on the Agency's discretion to bargain in this matter. In fact, the Agency has already indicated that it exempted positions from coverage under the Classification Act. Since the Agency has not identified any other specific limitation on its discretion, we find that the Agency's argument cannot be sustained.

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[3] *Eglin* was initially appealed to the U.S. Court of Appeals for the Eleventh Circuit. Subsequently, the appeal was withdrawn; however, appeals of other cases which rely on *Eglin* are still pending before various courts.

The Agency has cited two other restrictions in the Atomic Energy Act which allegedly serve to bar negotiations on the Union's proposal. The Agency claims that there is a pay limitation applicable to scientific and technical personnel and that adoption of a 20 percent salary increase which is the effect of the proposal would cause that limit to be exceeded. In addition, for positions which are not scientific or technical, the Agency claims that a 20 percent increase would exceed the statutory maximum payable rate which is the step 10 rate for the corresponding grade under the general schedule.

The Union states that the Agency's argument that a 20 percent increase would exceed certain pay limitations and its argument concerning the amount of the increase itself are merely speculative. The Union concedes, however, that the proposal "must be interpreted consistent with law and that law does limit pay in certain ways." Union Reply Brief at 7. Accordingly, based upon the Union's stated intent, we conclude that the Agency's claim that the proposal would require that employees' pay exceed certain pay limitations cannot be sustained.

B. *Alleged inconsistency with section 7106(a)(1) right to determine budget*

In our view, the Agency has not demonstrated that implementation of the proposal would directly interfere with management's right to determine its budget under the test set forth in *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 604 (1980), *enforced as to other matters sub nom. Department of Defense v. FLRA*,

659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 995 (1982). That is, the proposal does not prescribe a particular program or operation which must be included in the Agency's budget, nor does it prescribe a particular allocation that must be made. Rather, the proposal concerns employee salaries, an already existing item in the Agency's budget, and merely establishes a formula for adjusting such salaries. *See also* the decision and order on remand in *National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C.*, 28 FLRA No. 80 (1987), in which a majority of the Authority found that a proposal almost identical to the one presented here was negotiable. In that case the majority held that there was no compelling need for the agency regulation and the proposal did not conflict with the agency's right to determine its budget.

We further find that the Agency has not made a substantial demonstration that implementation of the proposal will result in a significant, unavoidable increase in costs which is not outweighted by compensating benefits. The Agency argues that in determining the costs of the proposal, the percentage pay increase recommended by the President's Pay Agent rather than the Advisory Committee on Federal Pay (two entities established by the Federal Pay Comparability Act of 1970, 5 U.S.C. § 5301), should be considered. According to the Agency, a percentage increase, averaging about 20 percent over the past few years, would necessitate one of the following actions: (1) congressional approval of an increase in the Agency's budget; (2) elimination of various safety-related research programs; or (3) a reduction-in-force. The Agency also argues that even assuming

a 5 percent pay increase, the figure that more closely approximates the recommendation made by the Advisory Committee on Federal Pay, the proposal would have a substantial, unavoidable impact on the Agency's ability to determine its budget.

We must reject the Agency's arguments with respect to the possible outcomes resulting from a 20 percent pay increase. The Union indicated in its submission to the Authority that the intent of the proposal is to use the figure of the Advisory Committee on Federal Pay, traditionally a much lower figure, rather than the 20 percent figure recommended by the President's Pay Agent. The Agency's sole argument with respect to the effect of the lower figure, that is, the Advisory Committee recommendation, is that adopting such an increase would have a substantial, unavoidable impact on the ability to determine its budget and result in a certain dollar cost. Such an argument does not satisfy the requirement of a substantial showing that the proposal would result in substantial and unavoidable cost increases that are not offset by compensating benefits. *See Fort Stewart (Georgia) Association of Educators and Fort Stewart Schools*, 28 FLRA No. 67 (1987).

Additionally, as we noted in *Fort Stewart*, and previously in *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1983), where a cost concern prevents parties from reaching agreement during the collective bargaining process, such concerns may be presented to the Federal Service Impasses Panel in a proceeding brought under section 7119 of the Statute to resolve a negotiation impasse.

V. *Order*

The Agency must upon request, or as otherwise agreed to by the parties, negotiate over the proposal.[4]

Issued, Washington, D.C., September 29, 1987.

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Jean McKee
JEAN MCKEE
Member

FEDERAL LABOR
RELATIONS AUTHORITY

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[4] In finding the proposal negotiable we make no judgment as to its merits.

Separate Opinion of Chairman Calhoun

I agree with my colleagues that the issues in this case are essentially the same as those in *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA No. 41 (1986); and *National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C.*, 28 FLRA No. 80 (1987). In my separate opinions in those cases, I stated that in the absence of a clear expression of congressional intent to the contrary, I find that wages and monetary fringe benefits of Federal employes are not a proper subject of collective bargaining under the Statute. I found no such statements of intent in those cases, and I find none here. Accordingly, I dissent.

Issued, Washington, D.C., September 29, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN
Chairman

APPENDIX E

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AS AMENDED, 5 U.S.C. §§ 7101-7135 (1988); AND § 161(d) OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, 42 U.S.C. § 2201(d) (1982)

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority; or
(G) the Federal Service Impasses Panel;

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or

remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this para-

graph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election, or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to

grant review of the action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretations of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work

project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefore at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and remaining members shall be appointed

for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue

subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Au-

thority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with

respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

(a) Nothing contained in this chapter shall preclude—

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive

representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

Sec. 161(d) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201(d) (1982)

"Sec. 161. In the performance of its functions the Commission is authorized to—

(d) appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with the Classification Act of 1949, as amended, except that, to the extent the Commission deems such action

necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws: *Provided, however,* That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule) whose position would be subject to the Classification Act of 1949, as amended, if such Act were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such Act for positions of equivalent difficulty or responsibility. Such rates of compensation may be adopted by the Commission as may be authorized by the Classification Act, as of the same date such rates are authorized for positions subject to such Act. The Commission shall make adequate provision for administrative review of any determination to dismiss any employee.

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No. 89-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner

v.

NATIONAL TREASURY EMPLOYEES UNION and
UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
DISCUSSION	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases — Page

Charleston Naval Shipyard v. FLRA, No. 88-2131 (4th Cir. Sept. 14, 1989) 5

Fort Stewart Schools v. FLRA, cert. granted, 50 U.S.L.W. 3212 (U.S., Oct. 2, 1989) (No. 89-65) ..*passim*

Statutes and Regulations

Civil Service Reform Act, 5 U.S.C. 7101 *et seq.*

5 U.S.C. 7117(a)(1) 3

5 U.S.C. 7117(a)(2) 3

Atomic Energy Act, 42 U.S.C. 2201(d) 2, 4, 5

Army Reg. 352-3, 1-7(h) 3

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MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

STATEMENT

The National Treasury Employees Union (NTEU or Union), which has filed its own petition in this case at No. 89-198, submits this memorandum to support the petition for writ of certiorari filed by the Federal Labor Relations Authority (FLRA or Authority).

This case concerns the negotiability, under Title VII of the Civil Service Reform Act, 5 U.S.C. 7101 *et. seq.* (the Statute), of an NTEU bargaining proposal made to the United States Nuclear Regulatory Commission (NRC). Specifically, the Union proposed that the salaries of NRC

employees be adjusted by the cost of living/comparability figure proposed each year by the Advisory Committee on Federal Pay. The NRC has the authority, under section 161(d) of the Atomic Energy Act (42 U.S.C. 2201(d)), to fix the compensation of its personnel without regard to the laws establishing the General Schedule pay system, which specifically provides pay rates for most white-collar workers in the federal service. In 1975, the Commission exercised its discretion under section 161(d) to exempt its positions from the GS pay schedule. The NRC nevertheless refused to bargain over NTEU's pay adjustment proposal.

The FLRA and the Fourth Circuit panel originally ruling in this case both agreed with NTEU that its proposal was negotiable under the Statute. The Court of Appeals sitting en banc, however, concluded that the pay proposal was not negotiable.

NTEU filed a petition for certiorari at No. 89-198, presenting three questions, relating to 1) whether pay matters are negotiable "conditions of employment" under the Statute; 2) whether NTEU's pay proposal interferes with management's right to determine its budget; and 3) whether the proposal is inconsistent with the NRC's statutory authority to fix the compensation of its employees.

Since the filing of NTEU's petition, the Court has granted review of three questions in a similar case, *Fort Stewart Schools v. FLRA*, No. 89-65. *Fort Stewart Schools* presents 1) the same "conditions of employment" issue presented here, as well as similar issues regarding 2) the effect of a pay proposal on management's budget right; and 3) whether there is a "compelling need" for an Army rule, relating to the method for setting wages, that is inconsistent with the union pay proposal.

The FLRA in its petition in this case now presents precisely the same three questions as those contained in NTEU's petition at No. 89-165. The FLRA has argued

that, notwithstanding the grant of review in *Fort Stewart Schools*, both NTEU's and its own petition should be granted in this case and then consolidated with *Fort Stewart Schools* (Pet. 17, n.13).

DISCUSSION

NTEU supports the Authority's position, for the reasons fully discussed in the Union's own petition for certiorari in this matter. NTEU here makes only two brief additional points.

1. As the FLRA states in its petition (Pet. 17, n.13), the grant of review in *Fort Stewart Schools* is insufficient to justify deferring review in the instant case. If the Court's ultimate ruling in *Fort Stewart Schools* is in favor of the union on the first two issues, the decision would not dispose of the broad and important third issue here, which concerns the inconsistency between a pay proposal and an agency's statutory discretion to set its employees' wages.

An otherwise negotiable bargaining proposal is made non-negotiable under 5 U.S.C. 7117 if the proposal is either "inconsistent with any Federal law or any Government-wide rule or regulation" or is inconsistent with an agency regulation for which there is a "compelling need," as determined by the FLRA. 5 U.S.C. 7117 (a)(1); 7117(a)(2). *Fort Stewart Schools* does not raise the question of a purportedly inconsistent Federal law, but rather concerns an inconsistent agency regulation, for which there is an alleged "compelling need." Specifically, the Army has a regulation (which is inconsistent with the employee union's pay proposal) which provides that, "to the maximum extent practicable," salary schedules at dependents schools should be the same as salary schedules at comparable public schools in the State. Army Reg. 352-3, 1-7(h). In *Fort Stewart Schools*, therefore, this Court must decide a narrow issue regard-

ing whether there is a "compelling need" for the Army pay regulation for dependents schools.

Resolution of that "compelling need" issue would have little, if any, effect on the third issue presented here. The issue of this *NRC* case, in fact, is broader, and its resolution therefore would have an impact on a wider category of cases.

The third issue in this case is not limited to determining the "compelling need" for any regulation. Rather, the question is whether the pay proposal is inconsistent with the NRC's statutory discretion, under the Atomic Energy Act, to set its employees' wages. The lower court reasoned that, despite the NRC's 1975 unilateral decision to opt out of the GS pay schedule, the Agency did not have sufficient statutory discretion to negotiate over employee compensation. Resolution of this issue, therefore, would require the Court to articulate standards for measuring an agency's discretion to set wages and thus for determining what type of statutory discretion is truly inconsistent with pay proposals.

In sum, this case not only presents issues equally as worthy of review as those in *Fort Stewart Schools*, but presents a broader third issue, whose resolution would undoubtedly affect a larger class of cases. Review should be granted in this case, therefore, so that the Court may resolve the full panoply of issues related to pay proposals in the federal service.

2. The FLRA has expressed some reservation (Pet. 16, n.12) as to whether the en banc ruling below is the law of the circuit with respect to the second and third issues in this case. As NTEU noted in its petition, a 6-4 majority ruled that pay is never a negotiable "condition of employment," while five judges gave alternative grounds for rejecting the Union's proposal. The five-member plurality directly ruled that the pay proposal interferes with management's budget right and is inconsistent with the

agency's statutory authority under the Atomic Energy Act. One judge declined to reach these alternative grounds, while four judges dissented on these second and third issues.

The Authority's concern, which would not vitiate the need for review of these issues, in any event, is a purely academic one. A three-judge panel of the Fourth Circuit has expressly concluded that the alternative rulings of the plurality below are controlling. In *Charleston Naval Shipyard v. FLRA*, No. 88-2131 (4th Cir. Sept. 14, 1989), the court decided that the en banc court's *NRC* ruling regarding management's budget rights "clearly controls" the issue of a pay proposal's effect on an agency's right to determine its budget. The panel therefore applied the en banc alternative holding that a union proposal is non-negotiable if it would ultimately result in specific dollar amounts being added to an agency budget. Fourth Circuit law regarding the second and third issues in this case, therefore, is not in doubt. By virtue of *Charleston Naval Shipyard v. FLRA*, the alternative holdings below constitute the law of the circuit.

CONCLUSION

The petition for a writ of certiorari should be granted together with NTEU's petition at No. 89-198, and the case should be consolidated with *Fort Stewart Schools v. FLRA*, No. 89-65.

Respectfully submitted,

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Nos. 89-198 and 89-562

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a)(14).

2. Whether compensation-related proposals – such as the proposal in this case to tie the salaries of employees of the Nuclear Regulatory Commission (NRC) to the recommendations of the Advisory Committee on Federal Pay – are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a) to set the agency's budget.

3. Whether the proposal in this case is non-negotiable under 5 U.S.C. 7117, which renders proposals non-negotiable if they are inconsistent with federal law, because Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), governs the pay of NRC employees.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

American Federation of Government Employees and Department of the Air Force, Eglin Air Force Base, 24 F.L.R.A. 377 (1986)	3
Department of the Navy, Military Sealift Command v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988)	4
Fort Stewart Schools v. *FLRA*:	
860 F.2d 396 (11th Cir. 1988)	6
No. 89-65 (cert. granted Oct. 2, 1989)	5, 6, 8
Navy Charleston Naval Shipyard v. *FLRA*, No. 88-2131 (4th Cir. Sept. 14, 1989)	5

Statutes:

Atomic Energy Act, § 161(d), 42 U.S.C. 2201(d)	4, 5, 7
Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*	2
5 U.S.C. 7102(2)	2
5 U.S.C. 7103(a)(14)	2
5 U.S.C. 7106	5
5 U.S.C. 7106(a)(1)	2, 4, 7
5 U.S.C. 7117	5
5 U.S.C. 7117(a)(1)	2
5 U.S.C. 7117(a)(2)	6
5 U.S.C. 5306	3

Statutes – Continued: Page

5 U.S.C. 5306(b)(3) 3
20 U.S.C. 241 6
20 U.S.C. 241(e) 7

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-198

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

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v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. la-20a)[1] is reported at 879 F.2d 1225. The opinion of the panel (Pet. App. 21a-41a) is reported at 859 F.2d 302. The

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[1] "Pet. App." citations are to the appendix to the petition in No. 89-198.

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opinion of the Federal Labor Relations Authority (Pet. App. 42a-51a) is reported at 29 F.L.R.A. 217.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on July 14, 1989. The petition for a writ of certiorari in No. 89-198 was filed on August 3, 1989. The petition in No. 89-562 was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. 7101 *et seq.*, federal employees have the right to bargain collectively over their "conditions of employment" (5 U.S.C. 7102(2)), which are defined to include "personnel policies, practices, and matters * * * affecting working conditions." 5 U.S.C. 7103(a)(14). The duty to bargain does not extend to proposals that interfere with certain rights reserved by the Statute to agency management, including the right to "determine the * * * budget * * * of the agency." 5 U.S.C. 7106(a)(1). Nor are agencies required to bargain over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).[2]

In this case, the National Treasury Employees Union (the Union), which represents many employees of the Nuclear Regulatory Commission (NRC), submitted a proposal for periodic cost-of-living adjustments. Specifically, the proposal (Pet. App. 4a-5a) called for an annual adjustment "equal to the statistical adjustment recommended to the

[2] Indeed, "to the extent such matters are specifically provided for by Federal statute," they are expressly excluded from the statutory definition of "conditions of employment." 5 U.S.C. 7103(a)(14).

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President" by the Advisory Committee on Federal Pay. See 5 U.S.C. 5306. The proposal further provided that the adjustment would be "unaffected by Presidential or Congressional actions." Pet. App. 4a-5a.[3] The NRC declined to bargain over the proposal.

2. The Federal Labor Relations Authority found the Union's proposal to be within the NRC's duty to bargain. Pet. App. 49a. Relying on its decision in *American Federation of Government Employees and Department of the Air Force, Eglin Air Force Base*, 24 F.L.R.A. 377 (1986), the Authority determined that proposals concerning employee compensation are negotiable "where (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists." Pet. App. 46a.[4]

The Authority also held that the NRC had not demonstrated that the proposal "would directly interfere with the management's right to determine its budget" since the proposal "does not prescribe a particular program or operation" or a "particular allocation that must be made," but "merely establishes a formula for adjusting * * * salaries." Pet. App. 47a, 48a. Moreover, although the Authority did not dispute the NRC's contention that the proposal "would have a substantial, unavoidable impact on the [NRC's] ability to determine its budget," the Authority held that the NRC had failed to show that the cost increases

---

[3] Pursuant to 5 U.S.C. 5306(b)(3), the Advisory Committee on Federal Pay is authorized to "report * * * findings and recommendations" with respect to federal pay to the President, but is granted no substantive authority to establish the pay of federal employees.

[4] The Chairman of the Authority dissented, finding that "wages and monetary fringe benefits * * * are not a proper subject of collective bargaining under the Statute." Pet. App. 51a.

would not be "offset by compensating benefits." *Id.* at 49a. It held that the NRC could not rely on Section 7106(a)(1) for those reasons.

The Authority acknowledged that Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), governs the compensation of NRC employees and authorizes the NRC "to deviate from pay schedules to the extent such action is 'necessary to the discharge of its responsibilities.' " Pet. App. 47a. However, the Authority stated that it did "not view the language of section 161(d) * * * as placing a specific limitation on the Agency's discretion to bargain in this matter." *Ibid.*

3. After a panel of the court of appeals upheld the Authority's decision (Pet. App. 21a-41a), the en banc court granted rehearing and reversed. *Id.* at la-20a.[5] The court first held that the Statute "does not authorize labor organizations and federal agencies to negotiate over employee pay." Pet. App. 6a. The court found that "[a] plain reading of the text indicates that Congress did not include employee pay within the statutory definition of bargainable matters." *Id.* at 6a-7a. It further concluded that "[n]o intent to permit general public-sector wage bargaining is evident in the [Statute's] language, structure, or legislative history." *Id.* at 7a. Indeed, the court found that the Statute's legislative history was " 'replete' with indications that Congress did not intend to subject employee compensation to collective bargaining." *Id.* at 9a (quoting *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1416 (3d Cir. 1988)).

In addition, as "persuasive alternative grounds for denying enforcement of the FLRA order," five members of the court concluded that the NTEU's proposal would interfere with the NRC's right to determine its budget. Pet. App.

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[5] Four of the ten judges dissented. Pet. App. 19a-20a.

13a.[6] The plurality found that the proposal would "divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay," and "would thus clearly 'affect' the NRC's authority to determine its own budget and is therefore nonnegotiable" under Section 7106. *Id.* at 15a.[7]

The plurality also concluded that the proposal is inconsistent with Section 161(d) of the Atomic Energy Act. Pet. App. 13a-18a. It found that the NRC had permissibly construed Section 161(d) to mean that the agency "may not depart from general government pay rates until it determines that such a departure is necessary to the discharge of its responsibilities." *Id.* at 18a. Accordingly, it found the proposal non-negotiable under Section 7117 as well.

ARGUMENT

The first issue presented by the petitions in this case is identical to the first question presented by the petition in *Fort Stewart Schools* v. *FLRA*, No. 89-65, which was granted on October 2, 1989, and the second and third issues in this case are analogous to the second and third questions presented in *Fort Stewart*. Thus, while we believe that the court of appeals' decision in this case is correct, we suggest

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[6] Four members of the court disagreed with that conclusion (Pet. App. 19a-20a), and one member did not reach the issue (*id.* at 19a). A panel of the Fourth Circuit has recently adopted the position of the five-member plurality. *Navy Charleston Naval Shipyard* v. *FLRA*, No. 88-2131 (Sept. 14, 1989), slip op. 5-7.

[7] The plurality noted the Authority's contention that the NRC had failed to demonstrate that the anticipated increase in costs would not be "offset by compensating benefits," but found that "nothing in the statute requires that this showing be made to the satisfaction of the FLRA." Pet. App. 16a. Instead, it concluded that "Congress * * * vested the NRC with the responsibility of balancing employee compensation against the agency's other goals." *Ibid.*

that the Court hold the petitions for disposition in light of *Fort Stewart*.

In *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (1988), the Eleventh Circuit held that three proposals concerning the compensation of teachers at schools for the dependents of Army personnel stationed at Fort Stewart, including a proposal specifying a 13.5% salary increase, were negotiable. In reaching that conclusion, the court found, in contrast to the Fourth Circuit in this case, that "Congress did not intend to preclude bargaining over wages and related benefits." 860 F.2d at 402. Moreover, the Eleventh Circuit found that the proposals would not interfere with the Army's right to determine its budget. It reasoned that "[t]he proposals would not necessarily increase the Army's costs," particularly in relation to the Army's total budget, including "bases, troops, weapons, vehicles, [etc.]," and that the Army had not established in any event that there would not be offsetting "compensating benefits." *Id.* at 405-406. Finally, the Eleventh Circuit rejected the Army's argument, under 5 U.S.C. 7117(a)(2), that the proposals were not bargainable because they were inconsistent with an Army regulation for which there was a "compelling need." The court held that there was no compelling need for the regulation, which required the salary schedules at the Fort Stewart Schools to be set by reference to salaries at local public schools, because it concluded that the statutory mandate (20 U.S.C. 241) requiring the Army to provide an education comparable to that provided by local public schools at a comparable per pupil cost could be met without requiring teachers' salaries to be comparable to those at local public schools. 860 F.2d at 405.

On October 2, 1989, the Court granted a petition for a writ of certiorari to review the Eleventh Circuit's decision in *Fort Stewart*. The first question presented by that petition is "[w]hether the wages and money-related fringe

benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable 'conditions of employment' under 5 U.S.C. 7103(a)." That question is in all material respects identical to the first question presented by the petitions in this case. The second question presented in *Fort Stewart* – whether the compensation-related proposals in that case "are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a)(1), to set the agency's budget" – is in many respects the same as the second question here. Thus, if that question is reached by the Court in *Fort Stewart*, its resolution is likely to be controlling here.

Moreover, if this Court reaches the third question presented by the petition in *Fort Stewart* – whether there is a compelling need for the Army's regulation mandating that teachers' salaries be comparable to those at local public schools – the disposition of that question could shed light on the resolution of the third issue raised by this case – whether the Union's proposals are consistent with Section 161(d) of the Atomic Energy Act. In *Fort Stewart*, the court of appeals' determination that there is no compelling need for the Army's salary regulation derived to a large extent from its conclusion that the Army had been granted negotiable discretion by the governing statute, which provides that, "[t]o the maximum extent practicable," per-pupil costs at dependents schools are to be comparable to those at local public schools. 20 U.S.C. 241(e). Similarly, in this case, the petitioners contend that the NRC was granted negotiable discretion because Section 161(d) of the Atomic Energy Act authorizes the NRC to fix the compensation of its employees "to the extent the Commission deems such action necessary to the discharge of its responsibilities." 89-198 Pet. 18; 89-562 Pet. 28. Thus, if this Court concludes in *Fort Stewart* that the relevant statute, which instructs the Army to set salaries in a particular manner but also

grants the Army some discretion, does not open the matter to negotiation, the basis for the lower court's conclusion in this case that the NRC does not have negotiable discretion with regard to the salaries of its employees will be strengthened.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's resolution of *Fort Stewart Schools* v. *FLRA*, No. 89-65.

Respectfully submitted.

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NOVEMBER 1989

* The Solicitor General is disqualified in this case.

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No. 89-562

In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

NATIONAL TREASURY EMPLOYEES UNION AND
UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Fort Stewart Schools v. *FLRA*, cert. granted, No. 89-65 (Oct. 2, 1989) 1, 2, 3

NTEU v. *FLRA*, petition for cert. pending, No. 89-198 1

Statutes:

20 U.S.C. 241 2

Atomic Energy Act of 1954, Pub. L. No. 83-703, § 161(d), 68 Stat. 919, 42 U.S.C. 2201(d) 2

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REPLY MEMORANDUM FOR THE PETITIONER

The United States Nuclear Regulatory Commission (NRC), in its brief responding to the Federal Labor Relations Authority's petition for a writ of certiorari, suggests (Resp. Br. 5-6, 8) that the Court hold the petition for a writ of certiorari for disposition in light of *Fort Stewart Schools* v. *FLRA*, cert. granted, No. 89-65 (Oct. 2, 1989).[1] In this connection, NRC

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[1] Respondent's brief also is directed to the petition for a writ of certiorari filed by the National Treasury Employees Union (NTEU) in *NTEU* v. *NRC*, petition for cert. pending,

asserts (Resp. Br. 5) that the first issue presented in this case is in all material respects identical to the first issue presented in *Fort Stewart*; and that the second and third issues presented in this case are analogous to the second and third issues presented in *Fort Stewart*.

The Authority does not concur that it is appropriate to hold the instant certiorari petition for disposition in light of *Fort Stewart*. As NRC itself recognizes (Resp. Br. 5), the second and third issues in the instant case can be said to be no more than analogous to the second and third issues in *Fort Stewart*. In particular, as to the third issue presented in *Fort Stewart* and the third issue in the instant case, there are significant differences in the statutes involved in resolving those issues. In *Fort Stewart* the third issue involves consideration of 20 U.S.C. 241, which in relevant part requires that compensation of federal dependents schools personnel be set without reference to pay-setting laws that establish the pay of most federal employees; and requires "to the maximum extent practicable" that the education provided by and average per pupil costs for the dependents schools be comparable to schools in the local community.

In contrast, the third issue in the instant case involves consideration of section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), which requires NRC to pay its employees in accordance with the pay-setting General Schedule system covering most federal employees, "except that, to the extent the Commission deems such action necessary to the discharge

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No. 89-198. The NTEU certiorari petition seeks review of the same Fourth Circuit judgment at issue in the instant case.

of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws." In 1975 NRC exempted itself from the coverage of the General Schedule. Thus, *Fort Stewart* and the instant case involve consideration of two distinctly different federal laws that allow two different federal agencies to set employee compensation in different ways. Therefore, even if resolution of the third issue in *Fort Stewart* "could shed light" on the third issue in the instant case, as NRC suggests (Resp. Br. 7), it will not necessarily be dispositive of that issue.

The third issue presented in the two cases is therefore sufficiently distinct that the Authority disagrees with respondent's suggestion that the petition for a writ of certiorari in the instant case be held and disposed of in light of the Court's resolution of *Fort Stewart*. The Authority respectfully submits, as suggested in its petition for a writ of certiorari (Pet. 17 note 13), that consolidation of the two cases for oral argument before the Court is appropriate. Such consolidation, the Authority respectfully submits, would provide for the most efficient use of the Court's time while also providing for complete disposition of all relevant issues in the two cases.[2]

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[2] The Acting Solicitor General authorizes the filing of this Reply Memorandum.

Respectfully submitted.

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NOVEMBER 1989

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